

**OFFICE COPY**

**APPENDIX**

**FILED**

**NOV 6 1969**

**JOHN F. DAVIS, CLERK**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1969**

**No. 300**

**James Tooahimpah Tate,  
Vila Tooahnippah (Paddlety),  
Julia Tooahnippah (Goombi),  
and James Tooahimpah Tate,  
the duly qualified and acting  
Administrator of the Estate  
of Frankie Lee Tooahnippah,  
deceased,**

*Petitioners,*

**V.**

**Walter J. Hickel, Secretary of  
the Interior for the United  
States, and Dorita High Horse,  
*Respondents.***

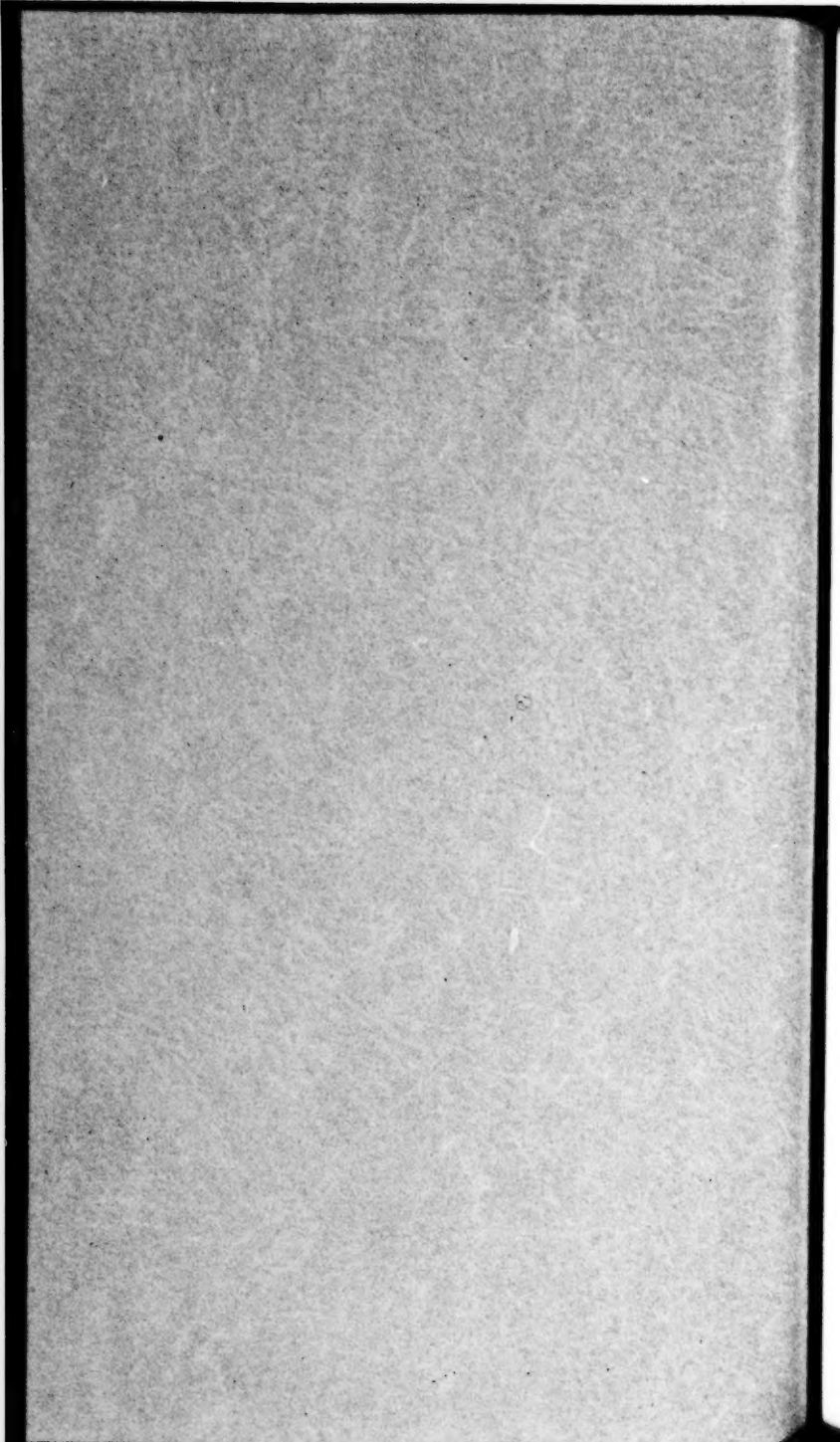
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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED JUNE 28, 1969  
CERTIORARI GRANTED OCTOBER 13, 1969**



## I N D E X

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CHRONOLOGICAL LIST OF DATES ON WHICH PLEADINGS  
WERE FILED, HEARINGS HELD AND ORDERS ENTERED

Explanatory Note: In the Appendix and as hereinafter set out in this chronological list, the pleadings and filings in the United States District Court and in the United States Court of Appeals for the Tenth Circuit on appeal will be in chronological order and thereafter there will appear proceedings held before the Examiner of Inheritance and before the Secretary of the Interior in a chronological order, which proceedings before the Examiner of Inheritance and before the Secretary of the Interior were prior to the filing of the Complaint in the United States District Court for the Western District of Oklahoma, therefore to be entirely chronological you should examine the last four (4) items numbered 19, 20, 21, and 22 prior to examination of Item 1 and subsequent items.

1. Complaint for Judgment Reversing Decision of the Defendant and Providing Declaratory and Other Relief by Tate et al., against Stewart L. Udall, Secretary of the Interior for the United States, was filed on August 25, 1967.
2. Order Permitting Dorita High Horse to Intervene was filed on September 27, 1967

3. Intervener's Answer was filed on September 27, 1967.
4. Intervener's Motion for Summary Judgment was filed on September 27, 1967.
5. Defendants Answer was filed on October 20, 1967.
6. Defendants Motion for Summary Judgment was filed on October 31, 1967, with Appendix containing Administrative Record below omitted.
7. Motion of Plaintiffs for Summary Judgment was filed on November 20, 1967.
8. Memorandum Opinion of Judge Luther B. Eubanks, United States District Judge, was filed on December 18, 1967.
9. Order and Judgment of the United States District Court was filed on December 28, 1967.
10. Order for Substitution of Deceased Party Plaintiff was filed on February 8, 1968.
11. Notice of Appeal by Defendant was filed on February 20, 1968.
12. Notice of Appeal by Intervener was filed on February 26, 1968.
13. Opinion of the United States Court of Appeals for the Tenth Circuit was filed on March 3, 1969.
14. Judgment in Case No. 9979 was filed on March 3, 1969.

15. Judgment in Case No. 9980 was filed on March 3, 1969.
16. Petition for Rehearing of James Tooahimpah Tate, et al., Appellees was filed on March 24, 1969.
17. Order Denying Rehearing by the United States Court of Appeals for the Tenth Circuit was filed on April 8, 1969.
18. Order granting the substitution of a party in lieu of a deceased party, one of the appellees, which order was filed by the United States Court of Appeals for the Tenth Circuit on June 20, 1969.
19. Will of George Chahsenah dated March 14, 1963, which was approved by the Examiner of Inheritance on August 31, 1966, and disapproved and disallowed on June 20, 1967, by the Secretary of the Interior on Appeal; the Secretary of the Interior acting by and through Raymond F. Sanford, Regional Solicitor pursuant to delegated authority.
20. Order Approving Will and Decreeing Distribution by the Examiner of Inheritance filed on August 31, 1966.
21. Petition for Rehearing Denied by the Examiner of Inheritance pursuant to Order filed on November 16, 1966.
22. Appeal from the Decision of the Hearing Examiner which order was issued by Raymond F. Sanford, Regional Solicitor

acting for the Secretary of the Interior pursuant to delegated authority which decision and order disapproved and disallowed the Will of George Chahsenah and which decision was issued and filed on June 20, 1967.

IN THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF OKLAHOMA

Viola Atewooftakewa (Tate),  
Frankie Lee Tooahnippah,  
Vila Tooahnippah, and  
Julia Tooahnippah (Goombi),

Plaintiffs

vs

Civ-67-323

Stewart L. Udall,  
Secretary of the Interior  
for the United States,  
Washington, D. C.,

Defendant

COMPLAINT FOR JUDGMENT REVERSING DECISION OF  
THE DEFENDANT AND PROVIDING DECLARATORY AND  
OTHER RELIEF

Comes now the Plaintiffs and for their action  
against the Defendant allege and state as follows,  
to-wit:

I

This action is an appeal seeking judicial  
review of the Orders of the Secretary of the  
Interior and of his subordinate appointees,  
personnel, and employees, namely, the Solicitor  
of the Secretary of the Interior and the Regional  
Solicitor of the Tulsa, Oklahoma, Region for the  
Secretary of the Interior, pursuant to 5 U.S.C.  
Sec. 1009 and Title 28 of the U.S.C. §1391 as  
amended and for appropriate relief as provided  
pursuant to the said Administrative Procedure Act.

II

An actual controversy exists between the  
Plaintiffs herein and the Defendant and the value of  
the claim of the Plaintiffs in this controversy  
exceeds the sum of \$10,000.00 exclusive of  
interest and costs.

III

That the Plaintiffs are restricted Indian wards  
of the United States Government and the Plaintiffs are  
members of the Comanche Tribe of Indians residing in the  
Western District of Oklahoma in the vicinity of  
Apache, Oklahoma, and are entitled to the protection  
of all of the Federal Laws, Rules, and Regulations  
affecting Indian wards of the United States.

IV

That George Chahsenah, a member of the Comanche

tribe unallotted died testate a resident of Caddo County, Oklahoma, on October 11, 1963, being approximately 55 years of age at the time of his death, and there was set for hearing before Kent R. Blaine, the Examiner of Inheritance for the Office of the Solicitor who had authority to determine the probate of the estates of Comanche Indians living in Western Oklahoma, and the said hearing was for the purpose of determining the heirs or for the probating of the Will of said George Chahsenah, which matter came on for hearing in four formal hearings held at Anadarko, Oklahoma, before the Examiner of Inheritance, and on August 31, 1966, Kent R. Blaine, the Examiner of Inheritance issued an Order approving the last Will of George Chahsenah executed on March 14, 1963, and the Examiner decreed distribution of the Estate of George Chahsenah as provided in said Will to the Plaintiffs herein.

V

That the approval and probate of the said Will was protested and contested by Dorita High Horse, the alleged daughter of George Chahsenah born out of wedlock and by Betsy Lois Chahsenah (Tarsip), Earl Chahsenah, Strudwick Tahsequaw, Lydia Mae Tarsip, James Chahsenah, and Albert Tahsequaw, Jr., Zelma Tselee, John H. Chahsenah, and Garnett Tahsequaw, nieces and nephews of George Chahsenah, the decedent.

VI

That the Plaintiff, Viola Atewoofatakewa (Tate) is a niece of George Chahsenah, the decedent, and the Plaintiffs, Frankie Lee Tooahnippah, Vila Tooahnippah, and Julia Tooahnippah (Goombi), are great nieces of George Chahsenah, the decedent, and are the children of Viola Atewoofatakewa (Tate).

VII

That George Chahsenah was never married and left

no issue of his body other than Dorita High Horse, who claims to be his daughter born out of wedlock, and the said George Chahsenah left no surviving brothers or sisters or parents or surviving spouse.

### VIII

That the contestants and protestants of the probate of the Will of George Chahsenah filed a Petition for Rehearing before the Examiner of Inheritance and the Petition for Rehearing was denied pursuant to an Order issued by the Examiner of Inheritance on November 16, 1966.

### IX

The protestants and contestants of the probate of the Will of George Chahsenah, acting by and through their Attorney, Houston Bus Hill, filed timely Notice of Appeal to the Secretary of the Interior from the Order of the Examiner of Inheritance dated August 31, 1966, ordering probate and approval of the said Will and from the Order denying the Petition for Rehearing dated November 16, 1966.

### X

That on June 20, 1967, there was issued an Order by Raymond F. Sanford, Solicitor for the Tulsa Region of the Office of the Solicitor for the United States Department of the Interior which Order of the Regional Solicitor reversed the Examiners approval of the Will of George Chahsenah and the Regional Solicitor disapproved the said Will pursuant to discretionary authority conferred by 25 U.S.C. § 373 and the Regional Solicitor stated that the Will did not achieve just and equitable treatment of the decedents heirs at law and was therefore disapproved and the Order of the Regional Solicitor of June 20, 1967, also disapproved all previous Wills of George Chahsenah

when and if same were offered for probate for the same reason, and the Regional Solicitor decreed distribution of the Estate of George Chahsenah to Dorita High Horse, the alleged daughter of the said decedent born out of wedlock.

## XI

That the Plaintiffs are aggrieved by the Order of June 20, 1967, issued by the Regional Solicitor that disapproved the Will of George Chahsenah and that ordered distribution of the Estate of George Chahsenah, deceased, to Dorita High Horse, the alleged daughter of the said decedent born out of wedlock because if the Regional Solicitor had not reversed the Examiner of Inheritance, the Estate of George Chahsenah, pursuant to the terms of the Will of the said George Chahsenah, would have been distributed to the Plaintiffs herein.

## XII

That the Plaintiffs have exhausted all of the administrative remedies available in seeking the approval of the probate of the Will of George Chahsenah, deceased, dated March 14, 1963, and distribution of his Estate to the Plaintiffs herein.

## XIII

That the acts of the Secretary of the Interior and of his representatives, including the Solicitor and the Regional Solicitor for the Tulsa Region, who promulgated the Order of June 20, 1967, denying the probate of the Will of George Chahsenah and decreeing distribution of his estate to Dorita High Horse are arbitrary, capricious, unreasonable and an abuse of discretion, and the said acts are in excess of statutory jurisdiction and authority and lack rational and statutory foundation to the detriment of the Plaintiffs by reason of a misconception of the power and authority of the Defendant, the Secretary of the Interior and of his representatives.

XIV

That the Regional Solicitor for the Tulsa Region erred in not finding according to the evidence and law that George Chahsenah died testate leaving a valid Will dated March 14, 1963, and the Regional Solicitor further erred in failing to Order distribution of the Estate of George Chahsenah pursuant to the terms of the last Will of George Chahsenah, deceased, to the Plaintiffs herein.

WHEREFORE, Plaintiffs pray that:

1. The Court review, reverse and set aside the Defendants decision and Order of June 20, 1967.
2. That the Defendant be directed to approve the probate of the Will of George Chahsenah dated March 14, 1963, and decree distribution of the Estate of George Chahsenah to the Plaintiffs herein in accordance with the terms of the Will.
3. That the Court enjoin and restrain the Defendant and his agents and representatives from distributing or authorizing or permitting the distribution of the properties and funds in the Estate of George Chahsenah until final disposition of this Complaint and Action.
4. That the Plaintiffs have such other and further relief as may seem just and proper in Law and equity together with all costs in this matter.

(Sgd.) Omer Luellen

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Omer Luellen

First State Bank Building  
Hinton, Oklahoma 73047  
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

O R D E R

A Motion to Intervene has been filed herein by Dorita High Horse, together with Memorandum of Points and Authorities in Support of Intervener's Motion, and the Court, after examining the same and being fully advised in the premises, finds that Dorita High Horse has an interest relating to the property which is the subject matter of this suit, and under Rule 24 (a) (2) of the Federal Rules of Civil Procedure, Dorita High Horse has a right to intervene and become a defendant in this action so as to protect her interest.

IT IS THEREFORE ORDERED AND DECREED that Dorita High Horse be and she is hereby permitted to intervene and become a defendant in this action.

Done this 27th day of September, 1967.

(Sgd.) Luther B. Eubanks  
Luther B. Eubanks  
United States District Judge

IN THE UNITED STATES DISTRICT COURT

INTERVENER'S ANSWER

Intervener answers the complaint herein as follows:

1. The complaint fails to state a claim against defendant for which relief can be granted and discloses on its face that this Court has no jurisdiction over the subject matter.

2. Intervener denies the allegations in paragraph I that this Court has jurisdiction pursuant to the provisions of the Administrative Procedures Act, 60 Stat. 237, 243, 5 U.S.C., Section 1009 and 28 U.S.C., Section 1391, as amended.

3. Intervener admits that part of the allegations in paragraph II of said complaint to the effect that the controversy exceeds the sum of \$10,000 exclusive of interest and cost.

4. Intervener denies that part of the allegations that the plaintiffs are restricted Indians but admits that they are Indian Wards of the United States Government and Members of the Comanche Tribe of Indians residing in the Western District of Oklahoma and are entitled to the protection of all the Federal Laws, rules and regulations affecting the Kiowa, Comanche and Apache Tribes. Further, Intervener admits that the lands here involved are restricted and held in trust by the United States Government, acting by and through the Secretary of Interior under the General Allotment Act of February 8, 1887, as amended.

5. Intervener admits that part of the allegations under paragraph IV to the effect that George Chahsenah was a Member of the Comanche Tribe, unallotted, and that he died on October 11, 1963, at the approximate age of 55 years but denies that he died testate. Intervener admits that several hearings were had before Kent R. Blaine, the Examiner of Inheritance, for the Office of the Solicitor and the Secretary of the Interior for the purpose of approving or disapproving said purported Last Will and Testament of George Chahsenah, deceased Comanche Unallottee, dated March 14, 1963, and to determine the heirs of the said George Chahsenah and the manner in which said estate should be distributed. Intervener admits that on August 31, 1966, the Examiner of Inheritance issued an order approving the purported Last Will and Testament and decreeing distribution of the estate as provided in said purported Will to the plaintiffs herein.

6. Intervener admits the allegations in paragraph V of said complaint.

7. Intervener admits the allegations in paragraph VI of said complaint.

8. Intervener denies the allegations in paragraph VII of the complaint to the effect that George Chahsenah was never married but admits that Dorita High Horse was George Chahsenah's daughter as so found and decreed by the Examiner in his Order of August 31, 1966. Intervener also admits that George Chahsenah left no surviving brothers or sisters, or parents or surviving spouse.

9. Intervener admits the allegations in paragraph VIII of said complaint to the

effect that contestants and protestants (including Intervener) of the purported Last Wills and Testaments of George Chahsenah, deceased Comanche Unallottee, filed a Petition for Rehearing before the Examiner of Inheritance but only as to the approval of said Will and the distribution of the estate to the beneficiaries thereunder, but not as to the Examiner's finding that Dorita High Horse was a daughter of George Chahsenah. Intervener admits that the Petition for Rehearing was denied by the Examiner on November 16, 1966.

10. Intervener admits that the protestants and contestants (including Intervener herein) of the purported Last Will and Testament of George Chahsenah, deceased Comanche Unallottee, by and through his attorney, Houston Bus Hill, filed an Appeal from the Examiner of Inheritance's Order of August 31, 1966, approving the purported Last Will of George Chahsenah, executed on March 14, 1963, and Decreeing Distribution of the estate to the plaintiffs herein and his Order of November 16, 1966, denying Petition for Rehearing and approving his original order. That said Appeal in no wise attacked the finding of the Examiner of Inheritance in his Order of August 31, 1966, wherein he found and decreed that Dorita High Horse was the daughter of George Chahsenah. That this finding by the Examiner that Dorita High Horse was the daughter of George Chahsenah thus becomes final and unappeal from and binding upon all the parties. That a copy of said Appeal is attached hereto, marked Exhibit A, and made a part hereof as if fully incorporated herein.

11. Intervener admits all of the allegations of paragraph X of said complaint, except that part which alleges that Intervener was born out of wedlock, which she denies.

12. Intervener admits the allegations of paragraph XI.

13. Intervener admits the allegations in paragraph XII of said complaint.

14. Intervener denies the allegations in paragraph XIII of said complaint to the effect that the Order, dated June 20, 1967, promulgated by the Secretary of Interior, acting by and through the Solicitor was arbitrary, capricious, unreasonable and an abuse of discretion, and further denies that said acts were in excess of statutory jurisdiction and authority and lacked rational and statutory foundation by reason of a misconception of his power and authority. Intervener states that said Order of June 20, 1967, was authorized under the Federal Act hereinabove mentioned and the rules and regulations promulgated by the Secretary of Interior, and the Secretary, acting by and through the Solicitor exercised proper discretionary power and action and same is not subject to review by this Court.

15. Intervener specifically denies the allegations in paragraph XIV of said complaint to the effect that the defendants, Secretary of Interior, acting by and through the Regional Solicitor for the Tulsa Region, erred in not finding, according to the evidence and law, that George Chahsenah died testate, leaving a valid Will, dated March 14, 1963, and failing to order distribution pursuant to the terms of said Will to the plaintiffs herein. On the other hand, Intervener states that there was ample evidence and law to support said Order of June 20, 1967, and the Secretary having disapproved said Will of March 14, 1963, and all previous purported Wills, the Order of distribution was

within the scope of his authority under the law and evidence. Intervener states that plaintiffs are not entitled to any relief and this Court is without jurisdiction to set aside said decision of June 20, 1967.

WHEREFORE, having fully answered herein, Intervener specifically requests that said complaint be dismissed, that relief prayed for therein by plaintiffs be denied; and that in the alternative, if said Court directs jurisdiction, that it uphold the Order of the Secretary of Interior, acting by and through the Solicitor, dated June 20, 1967.

(Sgd.) Houston Bus Hill  
HOUSTON BUS HILL  
1415 First National  
Building  
Attorney for Dorita  
High Horse, Intervener

(Exhibit "A" omitted in printing)

(Explanatory Note: Exhibit "A" consisted primarily of the resume of the Intervener's interpretation of the evidence presented before the Hearing Examiner.)

IN THE UNITED STATES DISTRICT COURT

INTERVENER'S MOTION FOR  
SUMMARY JUDGMENT

The Intervener, Dorita High Horse, (Defendant in this action), by her attorney, Houston Bus Hill, moves this Court for an order granting judgment in favor of the defendant and Intervener in the above entitled cause, pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint in this action on the ground that there is no dispute as to any material fact and the defendant and Intervener are entitled to judgment as a matter of law. The grounds for this motion are:

1. That the complaint fails to state a claim by plaintiffs upon which relief can be granted.

2. That this action is brought to review the decision of the Secretary of Interior, acting by and through Raymond F. Sanford, Field Solicitor, dated June 20, 1967.

3. That the disapproval of decedent's purported Last Will and Testament and certain other purported Wills and the determination of the heirs at law of the decedent and distribution of the estate to the Intervener, Dorita High Horse, daughter of decedent was a proper exercise of power conferred exclusively upon the Secretary of the Interior by Congress.

4. That this Court is without jurisdiction or power to set aside an order of the Secretary of Interior made within the scope of his authority as provided by Section 1 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C., Section 372.

5. That this Court is without jurisdiction or power to set aside an order of the Secretary of Interior in disapproving the purported Last Will and Testament of George Chahsenah, restricted fullblood deceased Comanche Unallottee Indian, determining the heirs of said decedent and distributing said estate to the daughter, Dorita High Horse, Intervener herein.

6. That the action of the Secretary of Interior in his Order of June 20, 1967, in rescinding the Examiner's Order of August 31, 1966, and disapproving the purported Last Will and Testament of George Chahsenah, dated March 14, 1963, and certain other purported Wills and determining decedent's heir as being his daughter, Dorita High Horse, and distributing said estate to Intervener and holding that no useful purpose would be served by additional hearings before the Examiner, is supported by the law and substantial evidence.

Respectfully submitted,

(Sgd.) Houston Bus Hill

HOUSTON BUS HILL

1415 First National Building

Oklahoma City, Oklahoma

Attorney for Intervener

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

VIOLA ATEWOOF TAKEWA (Tate),  
FRANKIE LEE TOOAHNIPPAH,  
VILA TOOAHNIPPAH, and  
JULIA TOOAHNIPPAH (Goombi),

Plaintiffs

-vs-

STEWART L. UDALL, Secretary  
of the Interior for the  
United States, Washington,  
. D. C.

Defendant

CIVIL NO. 67-323

A N S W E R

Comes now the defendant and for Answer to the Complaint of the plaintiff alleges and states:

I.

This defendant denies each, every, and all the allegations of plaintiff's complaint except those hereinafter specifically admitted or affirmatively alleged.

II.

Defendant admits that this Court has jurisdiction to review the decision of the Secretary of Interior pursuant to the Administrative Procedure Act.

III.

Defendant admits the allegation of paragraph II of plaintiff's complaint.

IV.

Defendant admits the allegations of paragraph III of plaintiff's complaint.

V.

Defendants admits the allegation of paragraph IV of the plaintiff's complaint.

VI.

Defendant admits the allegation of paragraph V of the plaintiff's complaint.

VII.

Defendant admits the allegation of paragraph VI of plaintiff's complaint.

VIII.

With reference to paragraph VII of plaintiff's complaint the defendant affirmatively alleges that Dorita High Horse is the admitted daughter of George Chahsenah who was born out of wedlock and that said George Chahsenah left surviving no brothers, sisters, parents, or spouse.

IX.

Defendant admits the allegation of paragraph VIII of plaintiff's complaint.

X.

Defendant admits the allegations of paragraph IX of plaintiff's complaint.

XI.

As to paragraph X of plaintiff's complaint this defendant states that on June 20, 1967, there was issued an Order by Raymond F. Sanford, Solicitor for the Tulsa Regional Office of the Solicitor for the United States Department of Interior, reversing the examiner of inheritance's approval of the will of George Chahsenah and the said Regional Solicitor disapproved said will in accordance with the statutory authority for the reasons set forth therein, copy of which is attached hereto and made a part hereof by reference. Said Opinion also

disapproved all previous wills of George Chahsenah and decreed the distribution of the estate of George Chahsenah to Dorita High Horse, the daughter of the decedent born out of wedlock.

XII.

This defendant specifically denies the allegations of paragraphs number XI, XII, XIII, and XIV of plaintiff's complaint as legal conclusions and not supported by the record and the evidence introduced and submitted before the examiner of inheritance and the Secretary of the Department of Interior.

XIII.

Further answering, this defendant alleges and states that the action of the Secretary of Interior in not approving the last will and testament of George Chahsenah, deceased unallotted Comanche Indian, was not arbitrary, capricious, unreasonable nor was there any abuse of discretion and all action taken was within the statutory jurisdiction and authority of the Secretary, and that said decision was in accordance with the evidence and the law and that his decision was supported by substantial evidence and may not be disturbed by this court.

Wherefore defendant prays that plaintiff take nothing by his complaint and that judgment be rendered in favor of the defendant affirming the administrative decision rendered in this case and for the dismissal of this action.

B ANDREW POTTER

United States Attorney

(Sgd.) Robert L. Berry

ROBERT L. BERRY

Assistant United States  
Attorney

(Certificate of Mailing omitted in Printing)

IN THE UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT

The defendant, Stewart L. Udall, Secretary of the Interior of the United States of America, Washington, D.C., by his attorneys, B. Andrew Potter, United States Attorney for the Western District of Oklahoma and Robert L. Berry, Assistant United States Attorney, moves this Honorable Court for an order granting summary judgment in favor of the defendant in the above-entitled cause, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and dismissing the Complaint in this action for the reason that there is no dispute as to any material fact and the defendant is entitled to judgment as a matter of law.

The particular grounds for this motion are as follows:

1. That the Complaint fails to state a claim upon which relief can be granted.

2. That this action is brought to review the final administrative decision of the Secretary of the Interior who, acting through the Regional Solicitor of the Department of the Interior under exclusive powers conferred upon the Secretary by Congress and redelegated by the Secretary to the Regional Solicitor, disaffirmed and set aside a hearing examiner's approval of a purported last will and testament and all previous wills of George Chahsenah, deceased unallotted Comanche Indian, that said decision is not arbitrary, capricious, nor abuse of discretion, nor otherwise not in accordance with law, is supported by substantial evidence, and that this Court is without jurisdiction to set aside that decision for the reason that the administrative actions were

within the scope of the authority of the Secretary of the Interior and are final and conclusive.

In support of this Motion for Summary Judgment, the defendant refers to the pleading and files herein, and the Brief of points and authorities and its appendix, attached hereto, all to be considered as a part hereof.

(Sgd.) B Andrew Potter  

---

UNITED STATES ATTORNEY  
WESTERN DISTRICT OF OKLAHOMA

(Sgd.) Robert L. Berry  

---

ASSISTANT UNITED STATES  
ATTORNEY  
ATTORNEYS FOR DEFENDANT

(Certificate of Mailing omitted in printing)

(Complete copy of Appendix containing copy of Administrative Record and Testimony omitted in printing by agreement)

(A portion of the Administrative Record does appear in this Appendix by stipulation and agreement and the items from the Administrative Record which appear in this Appendix commence on Page 64 of this Appendix and continue through Page 87.)

IN THE UNITED STATES DISTRICT COURT

MOTION OF PLAINTIFFS FOR SUMMARY  
JUDGMENT

---

I

Comes now the Plaintiffs by their Attorney of record and moves this Honorable Court for an Order granting Summary Judgment in favor of the Plaintiffs in the above entitled cause, pursuant to Rule 56 of the Federal Rules of Civil Procedure, upon the record and pleadings and as prayed for in Plaintiffs' Complaint, directing the approval and probate of the Will of George Chahsenah dated March 14, 1963, and the distribution of the Estate of George Chahsenah in accordance with the terms of the said Will to the Plaintiffs herein.

II

The grounds for this Motion are:

1. The Defendant's actions complained of are arbitrary, capricious, unreasonable and an abuse of discretion and are not in accordance with the Law and are not supported by substantial evidence.

2. The Defendant made a decision herein contrary to the due process of Law.

3. The Defendant ignored the significant and substantial evidence offered on the controverted facts and made an erroneous decision which was contrary to Law.

4. The Defendant in refusing to approve the Will of George Chahsenah did not act in a

discretionary manner and his acts were in fact arbitrary and capricious even though the Defendant attempted to justify his refusal to approve the said Will by stating that he was exercising his discretionary responsibility.

5. The Defendant made a decision which rested on an erroneous legal foundation.

6. The Defendant by disapproving the Will of George Chahsenah acted in excess of the Statutory jurisdiction authority of the Secretary of the Interior.

7. The Defendant's actions in disapproving the Will of George Chahsenah was a misconception of his power and authority relative to the disapproval or approval of Wills of Indian testators whereby he attempted to substitute his will for that of the Indian testator.

### III

In support of this Motion for Summary Judgment, the Plaintiffs refer to all of the pleadings and to the administrative record filed herein and the Brief and authority attached hereto, all to be considered a part hereof.

(Sgd.) Omer Luellen  
\_\_\_\_\_  
Omer Luellen  
First State Bank Building  
P.O. Box 96  
Hinton, Oklahoma 73047  
Attorney for the Plaintiffs  
herein.

(Certificate of Mailing omitted in printing)

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

VIOLA ATEWOOF TAKEWA (Tate)  
FRANKIE LEE TOOAHNIPPAH  
VILA TOOAHNIPPAH, and  
JULIA TOOAHNIPPAH (Goombi)

Plaintiffs

VS-

CIVIL NO.

67-323

STEWART L. UDALL, Secretary  
of the Interior for the  
UNITED STATES OF AMERICA

Defendant

DORITA HIGH HORSE

Intervenor

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Omer Luellen, Hinton, Oklahoma, for Plaintiff

Robert L. Berry, Assitant United States Attorney,  
Oklahoma City, Oklahoma, for Defendant

Houston Bus Hill, Oklahoma City, Oklahoma, for  
Intervenor

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MEMORANDUM OPINION

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Before LUTHER B. EUBANKS, United States District Judge

The plaintiff's are Comanche Indians who were named as beneficiaries under their deceased Comanche uncle's last will and testament which the Secretary of the Interior has declined to approve, and seek by this action to set aside the administrative decision which denied approval of the will, alleging it to be arbitrary, capricious, in excess of authority, without reasonable basis, and that it amounts to an abuse of discretion. 1/ The sole

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1. Plaintiffs have attempted to invoke jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. The decisions do not appear to be entirely in harmony as to the scope of the jurisdiction conferred by the Administrative Procedure Act to grant review of administrative decisions in actions brought against the Secretary of the Interior for that purpose. There can be no doubt but that this court has jurisdiction under 28 U.S.C. §1361, and upon that basis jurisdiction is taken here, as it has been by this court upon other occasions, in order to effectuate the purposes of the Administrative Procedure Act by providing the review function which the act contemplates. Moreover, this court has heretofore considered and resolved to its satisfaction that there is no express limitation contained in the language of §2 of the Indian Probate Act, infra, which precludes judicial review of Indian will approval decisions. Unlike §1 of the act, which relates to the determination of the heirs of Indians who die without having made a will, §2 contains no language by which will approval decisions of

basis for denying approval is that the will failed to make provision for the intervenor, who was determined by the Secretary to be the decedent's daughter born out of wedlock, and as such to be entitled to inherit the entire estate as decedent's sole heir, in the absence of an approved will, by virtue of the provisions of 25 U.S.C. §371.

Congress has granted to Indians the right to make wills, subject only to the approval of the Secretary of the Interior. 2/ Such approval is

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(Footnote continued from Page 28 )

the Secretary are made final and conclusive. See *Homovich v. Chapman*, 191 F.2d 761 (D. C. Cir. 1951); *Attocknie v. Udall*, 261 F. Supp. 876 (W.D. Okla. 1966).

2. The authority of the Secretary of the Interior to approve wills of Indians owning allotted lands is contained in § 2 of the Act of June 25, 1910, 36 Stat. 856, as amended by the Act of February 14, 1913, 37 Stat. 678, 25 U.S.C. § 373, which provides, in its essential details, that any Indians, except members of the Five Civilized Tribes or of the Osage Tribe, over the age of twenty-one years having any right, title or interest in any Indian lands or moneys held in trust by the United States or restricted upon alienation shall have the right to dispose of such property by will in accordance with regulations to be prescribed by the Secretary of the Interior. It further provides that such a will

(Footnote continued on Page 30)

requisite to validity. Lacking such approval an Indian will is totally without force and effect to dispose of the trust estate. The will which is the subject of this review has never received the required Secretarial approval and, therefore, is not a valid will; nor can it achieve the status of a valid will until such time as the approval required by the statute has been conferred. The question with which this court is concerned in the present action is whether the Secretary, in the circumstances presented, can properly withhold his approval of this will, which otherwise meets all of the requirements of a valid testamentary instrument, without such action amounting to an arbitrary denial of the decedent's statutory right to predetermine those persons to whom his trust estate shall devolve.

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(Footnote continued from Page 29 )

shall not be valid nor have any force or effect unless it shall have been approved by the Secretary of the Interior; that the Secretary may approve or disapprove the will either before or after the death of the testator and where such a will has been approved and it is subsequently discovered that there was fraud in connection with the execution or procurement thereof, the Secretary of the Interior within one year after the death of the testator may cancel the approval of the will, and the property of the testator shall thereupon descent or be distributed in accordance with the laws of the state wherein the property is located.

The will which is the subject of the administrative decision under review in this action was made by George Chahsenah, an unallotted Comanche Indian, approximately seven months prior to his death. He died without having ever been married, and without leaving a surviving father, mother, brother or sister. He was the owner by inheritance of certain Indian property allotted in accordance with the provisions of the General Allotment Act of February 8, 1887 3/ which, under the provisions of his will, was devised to a niece and her children with whom, the record indicates, he resided for a considerable portion of the later years of his life. The hearing examiner found no lack of testamentary capacity, and that the will was not the product of fraud, duress, coercion, or undue influence. 4/

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3. 24 Stat. 388. The act provides, inter alia, that the United States shall hold the lands in trust for the allottee during the existence of the trust period or any extension thereof, or, in case of his decease, for his heirs.
4. The administrative record discloses that the examiner held four separate formal hearings upon the decedent's will prior to the entry of his order of approval. The purpose of those hearings was to ascertain whether or not the will was entitled to receive the approval required by § 2 of the Indian Probate Act, supra. The examiner's authority to grant such approval is derived from a delegation of the Secretary's authority set out in the appropriate departmental regulations. The examiner found the will to be entitled to approval and he approved it.

In accordance with the applicable regulations 5/ the examiner entered an order which approved the will and decreed distribution of the estate in accordance with its provisions. A petition for rehearing was subsequently filed and denied by the examiner.

The hearing examiner found the decedent to have been survived by an adult daughter, Dorita High Horse, born out of wedlock, 6/ and that her mother and the decedent had cohabitated together in the custom and manner of Indian life sufficiently to entitle the daughter to inherit from the decedent under 25 U.S.C. §371. The effect of those findings is to make Dorita High Horse the decedent's sole heir at law, and thus entitled to inherit the decedent's entire estate in the absence of an approved will.

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5. The applicable regulations of the Secretary of the Interior are set out in Part 15 of 25 C.F.R. (1966 ed.).
  6. This court has not found the evidence of the decedent's paternity nearly as convincing as did the hearing examiner and the Regional Solicitor. The evidence in that regard which is contained in the administrative record is conflicting and, in my view, could have supported a finding to the contrary. I am intrigued by the singular fact that the mother of this putative daughter, Mary High, must have suffered from an equal lack of conviction of the decedent's paternity, as evidenced by her actions at the time of Dorita High Horse's birth. She attributed paternity to a different individual, and that individual is named as the father in the birth

(Footnote continued on Page 33)

The evidence in the administrative record indicates that the decedent and Dorita High Horse never maintained the usual father-daughter relationship. Their relationship can best be described as being that of casual acquaintances. The Regional Solicitor, in his administrative decision which rescinded the examiner's approval of the decedent's will, noted that fact. He stated: ". . . The record reflects that during his lifetime the decedent's only contribution toward the welfare of his daughter was to participate in her conception, to acknowledge her status as his daughter, and to visit briefly with her on rare occasions when they would by accident meet on public streets . . ."

Having been denied their petition for rehearing, the plaintiffs appealed to the Secretary of the Interior. Pursuant to authority delegated to the Solicitor of the Department of the Interior and redelegated to the Regional Solicitor, the latter reviewed the record and thereupon issued his decision which reversed the hearing examiner's order and withdrew the approval of the will which had been granted by the examiner. The Regional Solicitor's action constituted a final administrative decision

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(Footnote continued from Page 32)

certificate which was prepared at the time. The only telling evidence in support of the finding is a skillfully typewritten letter, dated August 31, 1949, and obviously not prepared by the decedent, which is addressed to the Oklahoma Bureau of Vital Statistics and which is purported to be signed by the decedent, wherein it is stated that Dorita High is his daughter and that he was "perfectly willing for her to use his name as her name on her birth certificate or in school." The record would seem to indicate that, until she acquired the surname "Horse" as a result of her present marriage, she went by the surname of her mother.

which exhausted the administrative remedy and led to the filing of this action for review.

The Regional Solicitor, in support of his conclusion that approval was to be denied, stated in his decision that "When a purported will is submitted for approval and it has been determined that it meets the technical requirements for a valid will, further consideration must be given before approving or disapproving it to determine whether approval will most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law."

The import of the Regional Solicitor's views is that an inequity will result should the decedent's estate be permitted to devolve upon a niece, who had provided the decedent with a home, and to her children, and thereby is denied to a putative daughter whose relationship with the decedent was only of the most casual nature. I find difficulty in following his reasoning to that conclusion. Moreover, there is danger in that course in that it provides no recognizable standard, thereby permitting the Secretary to go as near or as far in the grant of his sanction as his sympathies may lead him, in whatever direction, and conceivably could result in all manner of discretionary abuses.

Wills are a common feature of modern life. They are customarily made with only one purpose in view, that purpose being to alter the usual order of descent and distribution. Otherwise the act of making a will would be meaningless. The concept of the will making process is that the maker is provided with a method by which he can predetermine the persons to whom his estate shall devolve. It is not infrequent that those heirs who are not included in the will maker's bounty should appear to be victims of inequitable treatment. Equity plays no part in the will making process, as any heir who has been cut off without a dollar will vouchsafe. A will is the testator's last available means of rewarding those

who have befriended him during his lifetime and for evening the score with those who have not. It must be assumed that the will maker has his reasons, and that they are valid.

Congress has conferred the will making right upon all adult Indians. The only limitation upon that right is that the will must be approved by the Secretary of the Interior. It is incumbent upon the Secretary that he not lose sight of the fact that the will making right has been conferred upon the Indian and not upon the Secretary. Surely there must be a point beyond which the Secretary cannot go in withholding his approval before his act of disapproval is to amount to an arbitrary denial of the statutory will making right.

Where disapproval is founded upon some rational basis, denial of approval of an Indian will cannot be said to be an abuse of discretion. 7/ Examples of what may constitute reasonable bases upon which

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7. It is a well-established proposition that administrative action must have a "reasonable" or "rational" basis if it is to avoid the stigma of arbitrariness. *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575, 91 L.Ed. 1995 (1947); *Unemployment Compensation Commission of Territory of Alaska v. Aragan*, 329 U. S. 143, 67 S. Ct. 245, 91 L. Ed. 136 (1946); *Dell Publishing Co. v. Summerfield*, 198 F. Supp. 843 (D.D.C. 1961), aff'd, 303 F. 2d 766 (D.C. Cir. 1962); *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 54 S. Ct. 692, 78 L. Ed. 1260 (1934); *Eastern Central Motor Carriers Ass'n. v. United States*, 239 F. Supp. 243 (D.D.C. 1965)

approval may be denied are lack of testamentary capacity, fraud, duress, coercion, undue influence, overreaching, substantially changed conditions as to the decedent's heirs or estate occurring subsequent to the making of the will, and improvident disposition. In the decision now under review, the will was denied approval because the decedent had failed to make provision for a daughter born out of wedlock. In *Attocknie v. Udall*, 261 F. Supp. 876 (W.D. Okla. 1966), this court upheld a decision of the Secretary which granted approval to an Indian will in exactly opposite circumstances from those presented here. In that case approval was granted to a will wherein no provision was made for a son born out of wedlock. I am unable to perceive the distinction wherein that will was considered to be susceptible of approval but the will which is the subject of this review was not considered to be susceptible of being accorded the same treatment.

This decedent's will was not an unnatural one in light of the circumstances. Someone has lost sight of the fact here that Congress has conferred the right to make a will upon the Indian and not upon the Secretary. The Secretary can no more use his approval powers to substitute his will for that of the Indian than he can dictate its terms. If the will making right is to be meaningful the Indian must be given a free hand to decide upon those persons who shall be the objects of his bounty without unreasonable Secretarial interference. I find that the denial of approval of the last will and testament of George Chahsenah lacks a rational basis and is an unreasonable and arbitrary denial of a right conferred upon him by Congress.

The motion of the plaintiff is granted, the motions of the defendant and the intervenor are denied, and the will is remanded to the Secretary of the Interior with directions to approve it and distribute the decedent's estate in accordance with its provisions.

Counsel for Plaintiff will prepare formal judgment in accordance herewith.

The Clerk will mail a copy hereof to all counsel of record.

Dated this 18th day of December, 1967.

(Sgd.) Luther B. Eubanks

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Luther B. Eubanks

United States District Judge

IN THE UNITED STATES DISTRICT COURT

ORDER AND JUDGMENT

This cause came on to be heard on the Motion of the Defendant, Stewart L. Udall, Secretary of the Interior for the United States of America for Summary Judgment and on the Motion of the Intervener, Dorita High Horse for Summary Judgment, and on the Cross-Motion of the Plaintiffs, Viola Atewooflakewa (Tate), Frankie Lee Tooahnippah, Vila Tooahnippah, and Julia Tooahnippah (Goombi) for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the administrative record of the testimony, pleadings, and files on file herein relative to the probate of the Will of George Chahsenah, deceased Comanche Unallottee, and all of the parties herein having furnished their written Briefs to the Court upon the issues herein, and the Court having determined that this Court has jurisdiction of the said Action, and the Court having found that the denial of the approval of the last Will and Testament of George Chahsenah, deceased, dated March 14, 1963, by the Secretary of the Interior lacks a rational basis and is an unreasonable and arbitrary denial of the right of George Chahsenah to make his last Will and Testament as conferred upon him by Congress, and due deliberation having been had thereon, and the decision of this Court having been filed herein, it is

ORDERED that the Defendant's Motion for Summary Judgment be and the same hereby is denied, and it is further

ORDERED that the Intervener's Motion for Summary Judgment be and the same hereby is denied, and it is further

ORDERED that the Plaintiff's Cross-Motion for Summary Judgment be and the same is hereby granted, and it is further

ORDERED, ADJUDGED AND DECREED that the last Will and Testament dated March 14, 1963, of George Chahsenah, deceased Comanche Unallottee, is remanded to the Secretary of the Interior for the United States, and it is further

ORDERED, ADJUDGED AND DECREED that the Secretary of the Interior approve the last Will and Testament of George Chahsenah, deceased, and distribute his Estate in accordance with the provisions of the decedents last Will and Testament.

Dated this 28 day of December, 1967.

(Sgd.) Luther B. Eubanks

Luther B. Eubanks

United States District Judge

IN THE UNITED STATES DISTRICT COURT

ORDER FOR SUBSTITUTION OF DECEASED  
PARTY PLAINTIFF

This cause coming on for hearing on the 8th day of February, 1968, on the Motion of the Plaintiffs for the Substitution of James Tooahimpah Tate as one of the Plaintiffs in place of Viola Atewoofatakewa (Tate), deceased, and it appearing to the Court that Viola Atewoofatakewa (Tate), one of the above named Plaintiffs, died intestate on the 26th day of Novmeber, 1967, and no legal representative has been appointed for her estate.

It further appearing to the Court that a Judgment was rendered in the above styled matter on the 28th day of December, 1967, and that this is an action and judgment requiring the Secretary of the Interior to approve the Will of George Chahsenah whose Will was dated March 14, 1963, and it further appearing to the Court that the claim and judgment of the Plaintiff Viola Atewoofatakewa (Tate) as an heir at law, devisee and legatee of George Chahsenah was not extinguished by the death of Viola Atewoofatakewa (Tate).

It further appearing to the Court that James Tooahimpah Tate is the surviving husband of Viola Atewoofatakewa (Tate), now deceased, and that he should be substituted as one of the Plaintiffs herein in place of Viola Atewoofatakewa (Tate), his deceased wife.

IT IS ORDERED that James Tooahimpah Tate be substituted as one of the Plaintiffs herein in place of Viola Atewoofatakewa (Tate), deceased, without prejudice to any proceedings, including Judgments heretofore had in this

action and that the title of the action, including the Judgment herein, be amended accordingly.

(Sgd.) Luther B. Eubanks  
Luther B. Eubanks,  
District Judge for the  
Western District of  
Oklahoma

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

Notice is hereby given that Stewart L. Udall, Secretary of the Interior for the United States, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the judgment entered in this action on December 18, 1967. The Appellant herein is Stewart L. Udall, and the Appellees are James Tooahimpah Tate, Frankie Lee Tooahnippah, Vila Tooahnippah, and Julia Tooahnippah (Goombi).

B. ANDREW POTTER  
United States Attorney

(Sgd.) Robert L. Berry  
ROBERT L. BERRY  
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

Notice is hereby given on this 23rd day of February, 1968, that Intervener-Defendant, Dorita High Horse, on her own behalf hereby Appeals to the United States Court of Appeals for the Tenth Circuit from the judgment entered by this Court in this action on December 28, 1967, and the action of the Court on said date in denying Intervener's and Defendant's Motion for Summary Judgment and granting judgment for the plaintiffs. The Court's judgment reverses the Secretary of Interior's decision of June 20, 1967, A-T-4 (Exhibit 1-1) of Intervener's Motion for Summary Judgment filed September 27, 1967.

This Appeal is taken pursuant to Rule 12 of the Tenth Circuit Court of Appeals and Rule 73 of the Federal Rules of Civil Procedure.

Respectfully submitted,

(Sgd.) Houston Bus Hill

Houston Bus Hill

1415 First National  
Building

Okla. City, Okla. 73102  
Attorney for Intervener

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

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JANUARY, 1969, TERM

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DORITA HIGH HORSE,

Appellant,

vs.

Number  
9979

JAMES TOOAHIMPAH TATE,  
FRANKIE LEE TOOAHNIPPAH,  
VILA TOOAHNIPPAH and  
JULIA TOOAHNIPPAH (GOOMBI),

Appellees.

STEWART L. UDALL, SECRETARY  
OF THE INTERIOR, DEPARTMENT  
OF INTERIOR OF THE UNITED  
STATES OF AMERICA,

Appellant,

vs.

Number  
9980

JAMES TOOAHIMPAH TATE,  
FRANKIE LEE TOOAHNIPPAH,  
VILA TOOAHNIPPAH and  
JULIA TOOAHNIPPAH (GOOMBI),

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Houston Bus Hill, Oklahoma City, Oklahoma, for  
Appellant, Dorita High Horse;

Clyde O. Martz, Assistant Attorney General,  
Washington, D. C. (B. Andrew Potter, United States  
Attorney, Oklahoma City, Oklahoma, Robert L. Berry,  
Assistant United States Attorney, Oklahoma City,  
Oklahoma, S. Billingsley Hill and John G. Gill, Jr.,  
Attorneys, Department of Justice, Washington, D. C.  
on the brief) for Appellant, Stewart L. Udall,  
Secretary of the Interior.

Omer Luellen, Hinton, Oklahoma, for Appellees.

Before MURRAH, Chief Judge, and PHILLIPS and HILL,  
United States Circuit Judge.

PER CURIAM.

This litigation originated with the filing of a  
complaint in the United States District Court for  
the Western District of Oklahoma by the appellees  
in the two consolidated appeals before us. The  
action sought judicial review of the orders of the  
Secretary of the Interior and his subordinates.  
Jurisdiction was invoked under the Administrative  
Procedure Act and 28 U.S.C. § 1391. The trial  
court took jurisdiction under § 1391, sustained  
a Motion for Summary Judgment filed by the plain-  
tiffs, appellees here, and reversed the order  
of the Secretary and his subordinates.

The basic facts are without dispute. One  
George Chahsenah, a Comanche Indian, died, leaving

a will dated March 4, 1963, and by this instrument left all of his estate consisting of Indian Trust property to his niece and her three children, who are the appellees in both appeals. 1/ Pursuant to 25 U.S.C. §§ 372 and 373, after hearings, a Department of Interior Examiner of Inheritance approved the will and ordered distribution of the estate accordingly. Appellant, Dorita High Horse, the natural daughter of the testator, contested the will before the Examiner and appealed the decision to the Secretary of the Interior.

The Secretary reviewed the record, approved the findings of fact made by the Examiner, including a finding that Dorita was the natural daughter and only heir-at-law of the decedent, and ruled that it was "inappropriate" to perpetuate this utter disregard for the daughter's welfare by lending his approval to decedent's will." He disapproved the will and ordered distribution to Dorita High Horse, as the sole heir of decedent. The filing of this action followed and Dorita intervened to assert her rights under the decision of the Secretary.

At the outset we are confronted with the question of jurisdiction, which was raised in the trial court and argued here by appellees. A lengthy discussion of the question is not necessary because

- 
1. The record shows that the decedent had executed five prior wills. The first in 1956 left his property to a niece; the second in 1957 left his property to a friend; the third in 1959 left his property to a different friend; the fourth in favor of a nephew; and the fifth devised his estate to a cousin. None of his wills contained any reference to appellee Dorita High Horse, his daughter.

this court, in two recent decisions, has denied jurisdiction of the courts to review orders of the Secretary concerning either intestate succession of restricted Indian property or the approving or disapproving of wills affecting restricted Indian property. In a well reasoned opinion in Heffelman v. Udall, 378 F.2d 109 (1967), Judge Lewis held that sections 1 and 2 of 25 U.S.C. § 372 precluded judicial review of such orders in any action brought under 28 U.S.C. § 1331, § 1361, § 1391 or § 2201. In Attocknie v. Udall, 390 F. 2d 636 (1968), cert. den. October 14, 1968, this court reaffirmed the teachings of Heffelman, and we certainly are not disposed to disturb the law of those cases.

For the reasons stated in Heffelman v. Udall, supra, and Attocknie v. Udall, supra, the judgment of the trial court is Vacated and the case is Remanded with directions to dismiss the action for want of jurisdiction.

filed  
United States Court of Appeals  
Tenth Circuit

MAR 3 1969

William L. Whittaker  
Clerk

JANUARY TERM, MARCH 3rd, 1969.

Before Honorable Alfred P. Murrah, Chief  
Judge, and Honorable Ori L. Phillips  
and Honorable Delmas C. Hill, Circuit  
Judges.

Dorita High Horse,	}	
Appellant,	}	
9979	}	
vs.	}	Appeal from the
	}	United States
James Tooahimpah Tate,	}	District Court
Frankie Lee Tooahnippah,	}	for the Western
Vila Tooahnippah and	}	District of
Julia Tooahnippah	}	Oklahoma.
(Goombi),	}	
Appellees.	}	

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that for the reasons stated in Heffelman v. Udall, 378 F.2d 109 (1967) and Attocknie v. Udall, 390 F.2d 636 (1968) cert. den. October 14, 1968, the judgment of the trial court is vacated and the case is remanded with directions to dismiss the action for want of jurisdiction. It is further ordered that appellant have and recover of and from appellees her costs herein.

WILLIAM L. WHITTAKER, Clerk

By (Sgd.) Gladys E. Hobbs  
Deputy Clerk.

Costs of appellant:  
Clerk: Flat Fee \$25.00

JANUARY TERM, MARCH 3rd, 1969.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable Delmas C. Hill, Circuit Judges.

Stewart L. Udall, Secretary  
of the Interior, Department  
of Interior of the United  
States of America,

Appellant,

9980

**VS.**

James Tooahimpah Tate, Frankie  
Lee Tooahnippah, Vila  
Tooahnippah and Julia  
Tooahnippah (Goombi),

Appellees.

Appeal from the  
United States  
District Court  
for the Western  
District of  
Oklahoma.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that for the reasons stated in *Heffelman v. Udall*, 378 F.2d 109 (1967), and *Attocknie v. Udall*, 390 F.2d 636 (1968) cert. den. October 14, 1968, the judgment of the trial court is vacated and the case is remanded with directions to dismiss the action for want of jurisdiction.

WILLIAM L. WHITTAKER, Clerk

By (Sgd.) Gladys E. Hobbs

Deputy Clerk.

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

---

No. 9979

---

DORITA HIGH HORSE,  
Appellant,

VERSUS

JAMES TOOAHIMPAH TATE, ET AL.,  
Appellees.

---

No. 9980

---

STEWART L. UDALL, SECRETARY OF THE INTERIOR, DE-  
PARTMENT OF INTERIOR OF THE UNITED STATES  
OF AMERICA,

Appellant,

VERSUS

JAMES TOOAHIMPAH TATE, ET AL.,  
Appellees.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF OKLAHOMA

PETITION FOR REHEARING OF JAMES  
TOOAHIMPAH TATE, ET AL., APPELLEES.

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The Appellees above named respectively  
Petition this Honorable Court for a rehearing of  
the Appeal in the above entitled causes and in  
support of their Petition, represent and state  
to the Court as follows:

This Honorable Court rendered its Opinion  
on March 3, 1969, in which Opinion the Judgment  
of the Trial Court was vacated and the case  
remanded with directions to dismiss for want of  
jurisdiction and the said Opinion gave as  
authority for its decision herein Heffelman v.  
Udall, 378 F.2d 109 (1967). In Heffelman,  
Judge Lewis of the Tenth Circuit held that as  
long as an Indian allotment remains subject  
to the control of the Secretary sections 1 and  
2 of the Act of June 25, 1910 should be viewed  
as complementing each other with respect of  
the finality of the administrative determina-  
tion of facts and Section 1 having been  
previously held unreviewable by the Court,  
therefore Heffelman held that Section 2 relative  
to approval or disapproval of the Wills of  
Indians by the Secretary was unreviewable in  
the Courts. In the last paragraph of Heffelman  
we find the following statement:

"The administrative record, other  
than the decision (which indicates  
consideration of these allegations  
and concludes that appellant was  
afforded full opportunity to  
present his claims), is not before  
us. We thus conclude that the  
trial court properly held that  
jurisdiction did not exist under  
28 U.S.C. § 1331 (federal question);

28 U.S.C. § 1361 (mandamus, see Prairie Band of Pottawatomie Tribe of Indians v. Udall, 10 Cir., 355 F.2d 364, 367); 28 U.S.C. § 1391 (e) (venue); or 28 U.S.C. § 2201 (declaratory judgment).

The judgment is affirmed.

Your Petitioners further state that in Heffelman Judge Lewis stated that the Trial Court in Heffelman properly held that jurisdiction did not exist under 28 U.S.C. § 1361.

Your Petitioners further state that Judge Eubanks, the Trial Court, in the case under consideration, Atewooftakewa v. Udall, 277 F. Supp. 464 (1967) stated in footnote 1 as follows:

"There can be no doubt but that this court has jurisdiction under 28 U.S.C. § 1361, and upon that basis jurisdiction is taken here, as it has been by this court upon other occasions, in order to effectuate the purposes of the Administrative Procedure Act by providing the review function which the act contemplates."

Therefore, we see in the Trial Court of this case, jurisdiction was taken by Judge Eubanks under 28 U.S.C. § 1361.

Your Petitioners further state that in Heffelman on appeal, the principal considera-

tion of the Court was that APA did not apply and permit judicial review because of the final and conclusive clause of Section 1 and Section 2 of the Act of 1910, but the Court of Appeals in Heffelman also stated that the Trial Court in Heffelman properly held that there was no jurisdiction under 28 U.S.C. § 1361, which is the exact converse of what the Trial Court did in this case as jurisdiction was expressly taken by the Trial Court under the authority of 28 U.S.C. § 1361, therefore Heffelman is not proper authority to reverse this case.

Your Petitioners further state that Judge Eubanks, the Trial Court herein, further stated as follows:

"Congress has conferred the will making right upon all adult Indians. The only limitation upon that right is that the will must be approved by the Secretary of the Interior. It is incumbent upon the Secretary that he not lose sight of the fact that the will making right has been conferred upon the Indian and not upon the Secretary. Surely there must be a point beyond which the Secretary cannot go in withholding his approval before his act of disapproval is to amount to an arbitrary denial of the statutory will making right."

and the Trial Court held that the denial of the approval of the Will by the Secretary of the Interior acting by and through the Regional Solicitor of George Chahsenah lacked a rational basis and was an unreasonable and arbitrary denial of the right conferred by Congress upon the decedent Indian to make his Will, and there-

fore the Trial Court directed in the nature of a mandamus that the Secretary of the Interior approve the Will of the decedent Indian and distribute his estate in accordance with the provisions of the said Will.

Your Petitioners further state that they believe upon further study, this Honorable Court will ascertain that Heffelman is not a proper authority to reverse the Trial Court in this case because the Trial Court herein took jurisdiction pursuant to 28 U.S.C. § 1361 and by his decision in the nature of a mandamus directed the Secretary of the Interior to approve the Will of the decedent Indian. In Heffelman, Judge Lewis definitely stated that he concluded that the Trial Court held that jurisdiction did not exist under 28 U.S.C. § 1361 in Heffelman and that is the exact reverse of what the Trial Court did in this case because Judge Eubanks took jurisdiction under 28 U.S.C. § 1361 which, apparently was not done in Heffelman because in Heffelman the primary consideration was jurisdiction under APA as same applied as final and conclusive in the Act of 1910, Section 1 and Section 2.

Your Petitioners herein further state that they believe that Smith v. McNamara 395 F.2d 896 (1968) is persuasive authority for the decision rendered in the Trial Court by Judge Eubanks for taking jurisdiction in the case under consideration pursuant to 28 U.S.C. § 1361.

Your Petitioners further respectfully state that the Trial Court herein held that the Secretary of the Interior refused to approve the Will of the decedent Indian because the Secretary of the Interior acting by and through

the Regional Solicitor was of the opinion that the said Will did not achieve a just and equitable treatment of the alleged heirs of the decedent Indian and that the action of the Secretary was an arbitrary denial of the statutory rights of the Indian to make his Will as granted by Congress and was therefore subject to an Order directing the Secretary to approve the Will, which Order is in the nature of a mandamus, and the Trial Court further held that the denial of the approval of the Will by the Secretary of the Interior did not have a rational basis and was in a disabuse of his discretion and that the equitable reason given by the Secretary of the Interior for disapproving the Will of the decedent Indian was not a valid reason for denying the approval of the Will, and your Petitioners further state that *Hanson v. Hoffman, et al.*, 113 Fed. Reporter 2d 780 has set out the valid reasons for the disapproval of the Will of an Indian as follows:

"The restricted property and trust funds still being under the administrative control of the Secretary of the Interior, there can be no doubt of the power of the Secretary to have set aside the approval of the Will on the ground of fraud in the execution or procurement of the will within one year from the date of the death of Benjamin, and to set aside the approval at any time on the ground of lack of testamentary capacity, undue influence, or failure to comply with the rules and regulations in connection with the execution of the will, or on the ground of fraud, failure of subordinate officers to report the true facts of the Secretary, or other like grounds whereby approval

of the will was induced. Lane v. U.S. ex rel. Mickadiet, 241 U.S. 201, 207-209, 36 S. Ct. 599, 60 L.Ed. 956; Nimrod v. Jandron, 58 App. D. C. 38, 24 F. 2d 613."

Your Petitioners further state that the equitable reason given by the Secretary of the Interior acting by and through the Regional Solicitor for the disapproval of the decedent Indians Will in this case was not a valid or legal reason for the failure to approve the Will of the decedent Indian, therefore by the arbitrary denial of the right of the Indian to make a Will and have same approved, the Secretary of the Interior is subject to an Order to approve said Will in the nature of a mandamus as he was directed and ordered to so do by the Trial Court herein, pursuant to the jurisdiction granted by 28 U.S.C. § 1361.

Your Petitioners further state that the final and conclusive provision found in 25 U.S.C. § 372 and by Heffelman applied to 25 U.S.C. § 373 is not in accordance with the present thinking of the United States Supreme Court and as more particularly exemplified in Abbott Laboratories v. Gardner, 387 U. S. 136, 87 S. Ct. 1507 (1967) which case was decided on May 22, 1967. This case pertains to pre-enforcement review of the Federal Food, Drug, and Cosmetic Act, but your Petitioners believe that the thinking of the Court is very persuasive herein and particularly wherein the Supreme Court states as follows:

"Early cases in which this type of judicial review was entertained, e.g., Shields v. Utah Idaho Central R. Co., 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111; Stark v. Wickard, 321 U. S. 288, 64 S. Ct. 559, 88

L.Ed. 733, have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U. S. C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701 (a). The Administrative Procedure Act provides specifically not only for review of '(a) agency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 U.S.C. § 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions,<sup>2</sup> and this

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2 See H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946), U.S. Code Cong. Serv. 1946, p. 1195; 'To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.'

Court has echoed that theme by noting that the Administrative Procedure Act's generous review provisions' must be given a 'hospitable' interpretation. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51, 75 S. Ct. 591, 594, 99 L.Ed. 868; see *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 433-435, 69 S. Ct. 1410, 1414-1415, 93 L.Ed. 1451; *Brownell v. We Shung*, *supra*; *Heikkila v. Barber*, *supra*. Again in *Rusk v. Cort*, *supra* 369 U.S. at 379-380, 82 S.Ct. at 794, the Court held that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review. See also, *Jaffe, Judicial Control of Administrative Action* 336-359 (1965)."

Your Petitioners further state that *Udall v. Taunah*, 198 F.2d 795 (1968), which Opinion was promulgated by Judge Hill of the Tenth Circuit is also persuasive for this Honorable Court to grant a rehearing in this case. In the *Taunah* case it was held that the Federal Court may issue a mandamus to require the exercise of permissible discretion by the Secretary of the Interior. In *Taunah* it was held that the Secretary had not exercised the proper discretion because the proper administrative hearings had not been consummated. The Secretary was directed by the Court to proceed with the proper administrative hearings to either approve or disapprove the family contract after the hearings had been completed. In this case, it is the opinion of the Petitioners, that the Trial Court properly held that the Secretary failed to perform his ministerial duty to approve the Will of the decedent Indian because there was no legal reason given by the Secretary for his disapproval of the said Will, except that equity had not been

consumated by the heirs and if that is the only reason given by the Secretary for the failure to approve the Will, he has thereby failed to perform his ministerial duty to approve the Will and the Secretary could be directed and was directed by the Trial Court to approve the Will in the nature of a mandamus because it became a ministerial duty of the Secretary to approve the Will if after administrative hearings had been consumated there was no legal reason to disapprove the Will of the decedent Indian, which was the situation herein and jurisdiction, of course, is granted pursuant to 28 U.S.C. § 1361.

Your Petitioners further state that this Honorable Court has cited for authority to deny jurisdiction herein *Attocknie v. Udall*, 390 F.2d 636. Your Petitioners believe that *Attocknie v. Udall* can be distinguished from the case under consideration because the Trial Court in *Attocknie v. Udall*, 261 F. Supp. 876 took jurisdiction under the APA and the gist of the decision of the Trial Court was:

"this Court must hold that there was substantial evidence that the testator was, at the time the will was executed, of sound mind and disposing memory, that such evidence was sufficient to support an administrative determination that there was no lack of testamentary capacity, that the decedent's denial of paternity of a child born out of wedlock is not sufficient, standing alone, to prove the existence of an insane delusion"

The Trial Court in the *Attocknie* case did not take jurisdiction under 28 U.S.C. § 1361 as was

taken by the Trial Court in the case of your Petitioners. The gist of the Trial Courts decision in Attocknie pertains to a question of fact as to the testamentary capacity of the testator and as to whether he was competent or incompetent and particularly as to whether he was suffering from an insane delusion, which, of course, was not the situation in this case, and as heretofore stated, the Trial Court herein took jurisdiction to direct the approval of the Will by the Secretary of the Interior because his reason for disapproving the Will was arbitrary etc. Jurisdiction, therefore that was taken herein by the Trial Court is permissive under 28 U.S.C. § 1361. Your Petitioners agree that final and conclusive would be more germane and would probably apply where there is question of fact as to whether the testator was competent or incompetent or suffering from an insane delusion.

Your Petitioners further state that the decedent Indian was given the right to make his Will by Congress and it was never the intent and purpose of Congress to give the Secretary of the Interior the arbitrary authority to disapprove the Will of an Indian for equitable reasons. Your Petitioners give as an extreme example, the example of the Secretary of the Interior giving as his reason for disapproving the Will of the decedent Indian the reason that the decedent Indian was a member of the Apache Tribe of Indians and that the Apache Indian Tribe had been a murderous group of Indians and therefore the Will of an Apache Indian should not be and would not be approved by the Secretary of the Interior. Your Petitioners further believe that any Court would take jurisdiction under such a factual situation and particularly under authority of 28 U.S.C.

§ 1361 and thereby direct the Secretary of the Interior by an order in the nature of a mandamus to approve the Will of the decedent Indian if his only reason for disapproving the Will of the decedent Indian was the reason that the decedent Indian was a member of the Apache Tribe of Indians.

Your Petitioners, therefore, state that for the foregoing reasons, this Petition for Rehearing should be granted and your Petitioners respectively request oral argument if the Court so desires.

(Sgd.) Omer Luellen  
Omer Luellen, Attorney for  
James Tooahimpah Tate, et  
al., the Petitioners herein  
and the Appellees herein.

(Verification omitted in printing)

Before Honorable Alfred P. Murrah, Chief  
Judge, and Honorable Orié L. Phillips and  
Honorable Delmas C. Hill, Circuit Judges.

Dorita High Horse, et al.,	)	
Appellants,	)	
	)	
vs.	)	9979-9980
	)	
James Tooahimpah Tate	)	
et al.,	)	
	)	
Appellees.	)	

These causes came on to be heard on the  
motion of appellees for a rehearing herein and were  
submitted to the court.

On consideration whereof, it is ordered  
that the said petition be and the same is here-  
by denied.

Before William L. Whittaker, Clerk.

April 8, 1969.

MAY TERM, JUNE 20, 1969

Before Honorable Alfred P. Murrah, Chief Judge

Dorita High Horse,

Appellant,

vs.

No. 9979

James Tooahimpah Tate,  
Frankie Lee Tooahnippah,  
Vila Tooahnippah, and  
Julia Tooahnippah (Goombi),

Appellee.

Stewart L. Udall, Secretary  
of the Interior for the  
United States,

Appellant,

vs.

No. 9980

James Tooahimpah Tate,  
Frankie Lee Tooahnippah,  
Vila Tooahnippah, and  
Julia Tooahimpah (Goombi),

Appellees.

On motion of appellee's administrator of the estate of Frankie Lee Tooahnippah, deceased, be and is hereby substituted for Frankie Lee Tooahnippah, now deceased.

it is ordered that  
administrator of the  
Tooahnippah, deceased, be  
for Frankie Lee

LAST WILL AND TESTAMENT  
of

George Chahsenah Allottee No. Unallotted Comanche  
Age Born 1908

I, George Chahsenah of the Comanche Tribe, of the State of Oklahoma, being of sound and disposing mind, realizing the uncertainty of human life, do make this my Last Will and Testament hereby revoking all former wills by me made, in manner and form following, that is to say:

FIRST. - I desire that all my legal debts be paid, including the expenses of my last illness, funeral, and burial.

SECOND. - I give, devise, and bequeath to - My niece, Viola Atewooflakewa, and her son, Frankie Lee Tooahnippah, in equal shares, all of my interest in the allotment of Wahahrockah, Comanche 2326.

THIRD: I give, devise and bequeath to Vila Tooahnippah, Julia Tooahnippah, daughters of Viola Atewooflakewa, in equal shares, all of my interest in the allotment of Sarah Chahsenah, Comanche 2778.

FOURTH: I leave nothing to my heirs at law except those persons hereinbefore mentioned for the reason that they have shown no interest in me.

I give, devise and bequeath all of the rest and residue of my estate, real, personal, and mixed, to: Viola Atewooflakewa, Frankie Lee Tooahnippah, Vila Tooahnippah and Julia Tooahnippah, in equal shares.

In witness whereof, I, George Chahsenah, have hereunto set my hand, sealed, published, and declared this to be my Last Will and Testament, this 14th day of March, in the year of our Lord one thousand nine hundred and sixty-three.

Witnesses:

/s/ John Paul Buzbee      /s/ George Chahsenah ( L.S.)

Residing at Anadarko, Oklahoma

/s/ Carolyn Nation

Residing at Anadarko, Oklahoma

The foregoing instrument of writing was here and now signed by George Chahsenah in our presence, and at his request and in the presence of each other we have signed as witnesses and he has published and declared this to be his (her) Last Will and Testament.

/s/ John Paul Buzbee

Residing at Anadarko,  
Oklahoma

/s/ Carolyn Nation

Residing at Anadarko,  
Oklahoma

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE EXAMINER OF INHERITANCE

Pursuant to the provisions of the Act of February 14, 1913 (37 Stat. 678), and the provisions of 25 CFR 81, the within will is hereby APPROVED in accordance with the Order of even date herewith.

Done at the City of Tulsa, Oklahoma.

/s/ Kent R. Blaine  
Kent R. Blaine,  
Examiner of Inheritance.

INSTRUCTIONS TO FIELD OFFICERS

1. The testator may sign by thumb mark. The witnesses must be able to write, and should not be interested as heirs or devisees.
2. Inquire carefully into the immediate family of testator. If a husband, wife, child or grandchild who is an heir is given nothing, the reason must be set out.
3. Witnesses and testator must sign in the presence of each other. Read the will carefully to testator and be sure that he understands it and that it expresses his wishes.
4. Whenever possible, include the name, allotment number, if any, age, residence, tribe, and relationship of each devisee, specific description of lands devised, and in case of inherited interests the name and allotment number of original allottee and interest of testator therein.

5. Explain fully to testator that fractional interests are of little or no value to a devisee if further divided, and that the entire interest in a specific piece of land is much more valuable than a fractional interest. The testator does not have to give the residue to "my heirs at law," he can give the residue to one person if he wishes. If he gives the residue to one person it prevents further divisions; if he gives it to several persons or to his "heirs at law" a further division takes place. He may also give all his estate or the residue to the Tribe (naming it) if he wishes.

U.S. Government Printing Office  
16-68692-1

AFFIDAVIT TO ACCOMPANY INDIAN WILL

STATE OF OKLAHOMA        )  
                              ) ss:  
COUNTY OF CADDO        )

I, George Chahsenah, being first duly sworn on oath, depose and say: That I am an enrolled member of the Comanche Tribe of Indians in the State of Oklahoma; that on the 14th day of March, 1963, I requested John Paul Buzbee and Carolyn Nation to act as witnesses thereto, that the said witnesses heard me publish and declare the same to be my last will and testament; that I signed said will in the presence of both witnesses and they signed the same as witnesses in my presence and in the presence of each other; that the said will was read and explained to me (or read by me), after being prepared and before I signed it; and it clearly and accurately expresses my wishes;

and I further state that no person has influenced me to make disposition of any part of my property in any other manner than I myself of my own free will desire and wish to dispose of it.

\*

/s/ George Chahsenah  
Allottee No. Unallotted

We, John Paul Buzbee and Carolyn Nation, each being first duly sworn, on oath, depose and state: That on the 14th day of March, 1963, George Chahsenah, a member of the Comanche Tribe of Indians of the State of Oklahoma, published and declared the attached instrument to be his (her) last will and testament, signed the same in the presence of both of us and requested both of us to sign the same as witnesses in his (her) presence and in the presence of each other; that said testator (testatrix) was not acting under duress, menace, fraud or undue influence of any person, so far as we could ascertain and in our opinion was mentally capable of disposing of all his (her) estate by will, and that neither of us is named as a beneficiary in said will or in any wise interested in the distribution of the estate of said testator (testatrix).

/s/ John Paul Buzbee

/s/ Carolyn Nation

\*At this point should be inserted the tribe and allotment or other identifying numbers of the devisees and beneficiaries and their relationship to the testator or testatrix (unless this information is shown in the body of the will), and the testator's or testatrix's reasons for making the devises, particularly when the immediate relatives are given little or none of the estate.

I, John Paul Buzbee, being first duly sworn, on oath depose and say:

That I am employed as General Attorney at Anadarko, in the State of Oklahoma; that on the 14th day of March, 1963, George Chahsenah, an enrolled member of the Comanche Tribe of Indians in the State of Oklahoma, requested me to prepare his (her) last will and testament; that I prepared the attached will and read (or had read by the interpreter) said will to testator (testatrix) and he (she) then stated that said instrument was drawn in accordance with his (her) own wishes as previously stated to me; that said testator (testatrix) was not, so far as I could ascertain, acting under duress, menace, fraud or undue influence of any person, and in my opinion was mentally capable of disposing of his (her) estate by will; that he (she) signed the same and published and declared it to be his (her) last will and testament before John Paul Buzbee and Carolyn Nation, whom he (she) requested to act as witnesses thereto; that there were present in the room with the testator (testatrix) at said time besides myself and the above-named witnesses, the following named persons:  
Florence C. Hutton.

/s/ John Paul Buzbee

Subscribed and sworn to before me this 14th day of March, 1963, by George Chahsenah, John Paul Buzbee and Carolyn Nation.

/s/ Florence C. Hutton  
Notary Public

My commission expires 12/24/66.

(Note: Instructions to Field Officers are printed on the reverse side of the will forms and are contained in the Transcript at Page 243.)

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UNITED STATES  
DEPARTMENT OF THE INTERIOR  
Office of the Solicitor  
Office of the Examiner of Inheritance  
712 Petroleum Building  
Tulsa, Oklahoma 74103

PROBATE  
H-173-66  
KRB

IN THE MATTER OF THE	)	
ESTATE OF:	)	
George Chahsenah,	)	ORDER APPROVING
deceased Comanche	)	WILL AND DECREE-
Unallottee	)	ING DISTRIBUTION

This case coming on to be heard before the Examiner of Inheritance, Office of the Solicitor, Tulsa, Oklahoma, and upon submission of the evidence, the following facts and conclusions of law are presented.

Four separate formal hearings were held in this estate. Notices of the first hearing were duly served upon the known probable heirs, devisees and other interested parties prior to that hearing by mailing a copy of such notice to each of them at their last known mailing address, and by posting a notice at five public places within the vicinity of the Anadarko Agency of the Bureau of Indian Affairs in Oklahoma, for 20 days or more prior to such hearing. Notices of the supplemental hearings were mailed to all known interested parties, or their attorneys of record, at least twenty days prior to scheduled hearings.

These hearings were concluded at Anadarko, Oklahoma, on December 9, 1965, for the purpose of ascertaining the heirs at law of this decedent and the facts and circumstances surrounding the execution of an instrument in writing, dated March 14, 1963, purporting to be his last will and testament.

The evidence adduced at these hearings disclosed that the decedent died on October 11, 1963, at the age of approximately 55 years, a resident of the State of Oklahoma. Beyond this, there are relatively few undisputed questions of fact or law. Dorita High, Kiowa-Comanche Unallottee, claims to be a surviving daughter, and, therefore, his sole heir at law. This is denied by the fifteen nieces and nephews who appear to be his heirs at law - if Dorita High is not his daughter. The majority of these nieces and nephews, and Dorita High, contend that the decedent was mentally incompetent to execute a valid last will and testament on March 14, 1963, and that the purported testamentary instrument executed on that date is not entitled to Departmental approval.

The evidence does establish that the decedent was never married, and that he had no surviving parent, brother or sister. Under the provisions of the Act of February 28, 1891, 26 Stat. 795, Dorita High would be an heir at law, if she is a daughter of this decedent, irrespective of any recognized marriage between her parents. On August 31, 1949, the decedent signed a sworn statement acknowledging that Dorita High was his daughter. On November 27, 1956, the decedent made a will stating that he had no children. The testimony of the numerous witnesses in this matter is equally inconsistent as to what the decedent did or said regarding this paternity question. Bearing in mind the apparent interest of some of the witnesses who testified on this question, their credibility, based on the personal observation of the undersigned, and the issues involved

when the above-mentioned written instruments were made, it is hereby found that Dorita High is, in fact, a daughter of this decedent. Therefore, under the laws of the State of Oklahoma and applicable Federal statutes, she would be the sole heir at law in the estate if the decedent had died intestate.

The decedent's trust or restricted property consists of interests in three Comanche allotments which are hereinafter described, and are situated in Oklahoma under the jurisdiction of the Anadarko Agency of the Bureau of Indian Affairs.

By the terms of the decedent's last will and testament, he makes specific devises to his niece, Viola Atewooftakewa, and to three of her children: Frankie Lee Tooahnippah, Vila Tooahnippah, and Julia Tooahnippah. The same four devisees are also the residuary beneficiaries who would share equally in any property not covered by the specific devises.

The evidence shows that the decedent's last will and testament was prepared by an attorney who, at that time, was employed by the Department. The scrivener and attesting witnesses, at the time this instrument was made, executed an affidavit showing that the will was properly made and executed when the decedent was of sound and disposing mind and memory and not acting under undue influence, fraud, duress or coercion. They could not recall this particular instrument or the decedent when they testified in this matter, but nothing was presented which would cast any doubt on their honesty, belief, or views as expressed in the affidavit.

The contestants of this will urge that from some date in the early 1940's, the decedent drank whisky, wine or other alcoholic beverages to an excess. Further, that this drinking pattern was progressive and that as the result of this excess use of alcohol, coupled with ill health, his mind

was so deteriorated that he was mentally incompetent to make a valid testamentary disposition of his property on March 14, 1963. While the evidence as to the nature and extent of the decedent's drinking pattern is extremely conflicting, the applicable rule of law is not. This Department has held in the Estate of Harris Eugene Russell, 70 I.D. 151, decided May 2, 1963, that the burden of proving mental capacity due to ill health and prolonged use of intoxicants is upon the contestant, and the testimony of law witnesses, who were not present when the will was made, is insufficient to meet this burden. This Russell case, wherein the initial ruling accepted a position similar to that asserted by the contestants, is distinguishable from the present case only in that the facts of chronic alcoholism coupled with diabetes were established to the satisfaction of the Superintendent of the Osage Indian Agency who made the findings of fact. In this case, the undersigned does not believe the evidence supports the factual conclusions which existed in the Russell case.

Several of the contestants and interested witnesses appearing on their behalf, testified that the decedent was always drunk during the last several years of his life. Other witnesses, whose interest in the matter was not established, also testified that they never saw the decedent sober during this same period. Without commenting on the credibility and knowledge of each individual witness, the following general observations seem applicable to all of this testimony. No one disputes the fact that this decedent drank to an excess - often and over an extended period of time.

The undersigned has no difficulty in accepting the fact that the decedent's excessive drinking may have grown progressively worse

during the last few years since this appears to be consistent with the pattern followed by all who use alcohol to an excess. On the other hand, it is impossible to accept at face value, testimony to the effect that he was "never sober" for a period of several years. Likewise, the undersigned would reject the idea that employees of the Field Solicitor's Office, past, present or future, would knowingly participate in the preparation and execution of a will for an intoxicated person. Further, it should be noted that drunken behavior stands out in every way from "normal, non-intoxicated behavior". It follows, therefore, that recollection of individual witnesses would naturally favor those experiences wherein alcohol was involved. If these general observations tend to favor validity of this will, one final general observation which might support an opposing view should be made. The contestants testified that when the decedent "needed" or really wanted something to drink, he would promise, threaten, beg, or do whatever was necessary in an attempt to get alcohol. This same testimony indicates that his relationship to friends and relatives was very often controlled by his drinking pattern at that time. This testimony is accepted as true for the same reason that other general conclusions in the paragraph are accepted. Such testimony is consistent with the common pattern and experience of those who use alcohol to an excess.

The testimony of all the witnesses who testified regarding the decedent's mental condition and drinking habits has been carefully considered and reviewed - regardless of the apparent interest or lack of interest - - of any witness. However, there is clear and convincing evidence by truly disinterested witnesses who were living in the same vicinity as the decedent at the time this will was made, which supports the conclusion that Mr. Chahsenah was mentally competent to make a will in

March, 1963, if he was sober. The testimony of other witnesses to the contrary is not sufficient to be convincing to the undersigned, particularly, when coupled with the terms of the instrument itself and general practice of the Field Solicitor's Office at Anadarko, which is followed with regards to testamentary instruments.

This will is not unnatural in that it fails to provide for the decedent's daughter, Dorita High. There is no evidence that he had any close paternal ties to this girl during the later part of his life. After the death of his mother in 1954, his closest relatives, besides his daughter, were nieces and nephews, and the testimony speaks for itself in establishing that relationships with these nieces and nephews was often "strained". On November 27, 1956, he executed a will naming his niece, Viola Atewoofatakewa as the sole beneficiary, and stated that Viola had been raised in his mother's home. Subsequently, he made four more wills including the March 14, 1963 instrument. In addition to the testimony, all five of these instruments have been reviewed in the light of the other evidence. It is hereby found that this last will is natural and logical in the light of all the evidence.

It is hereby found that this will was made in accordance with the facts and circumstances expressed in the testimony of the attesting witnesses, and no clear and convincing evidence has been presented which would justify denying Departmental approval.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by Section 1 of the Act of June 25, 1910 (36 Stat.

855), and other applicable statutes, and pursuant to 25 CFR 15, I hereby approve the decedent's last will and testament, dated March 14, 1963.

IT IS ORDERED, that the Superintendent will cause to be made a distribution of the trust or restricted estate of the decedent in accordance with his last will and testament, subject to payment of the probate fee and allowed claims, as follows:

To Viola Atewooftakewa, niece, and Frankie Lee Tooahnippah, grand-nephew, Comanche Unallottees and devisees, an undivided one-half interest in the following:

An undivided 1/4 interest in the allotment of Wah-ah-rock-ah, Comanche #2326, described as the SW/4 of Section 3-2N-8W, I.M., in Okla., containing 160 acres.

To Vila Tooahnippah and Julia Tooahnippah, grand-nieces, Comanche Unallottees and devisees, an undivided one-half interest in the following:

All that part of the allotment of Sarah Chahsenah, Comanche #2778, described as the SW/4 SW/4 of Sec. 4-4N-10W, I.M., in Oklahoma, containing 40 acres.

An undivided 1/5 interest in the allotment of Sarah Chahsenah, Comanche #2778, described as the SE/4 SW/4 of Sec. 4-4N-10W, I.M., in Oklahoma, containing 40 acres.

To Viola Atewooftakewa, a, niece, Frankie Lee  
Tooahnippah, grand-nephew, Vila Tooahnippah and  
Julia Tooahnippah, grand-nieces, Comanche  
Unallottees and devisees, an undivided 1/4  
interest in the following:

Any and all other trust property, real,  
personal or mixed, not otherwise  
disposed of under the terms of the will,  
if any there be.

The following claims are hereby allowed and  
are to be paid in the order listed below from funds  
now held or hereafter accruing to the credit of  
the estate, subject to payment of the probate  
fee:

1. Crews Funeral Home, Apache, Oklahoma, in  
the amount of \$843.00, covering decedent's  
funeral expenses.

(The following claims have equal priority  
of payment).

2. James W. Aust Finance & Loan Co., 510  
D. Ave., Lawton, Oklahoma, in the amount of  
\$332.79, covering loans made to the decedent  
from November 1960 through February 1961.

C. H. Christian, Route 3, Apache,  
Oklahoma, in the amount of \$56.85, covering  
money loaned to the decedent.

Schartzer's Food Market, Apache,  
Oklahoma, in the amount of \$124.60, covering  
groceries purchased by the decedent.

Elliott Department Store, P.O. Box 352, Apache, Oklahoma, in the amount of \$10.15, covering purchases made by the decedent.

D. V. Warner, Apache, Oklahoma, in the amount of \$1,000.00, covering money loaned to the decedent on July 1, 1961, for the purpose of providing legal services to Strudwick Tahsequah represented by a promissory note signed by this decedent. The balance of the claim of D. V. Warner in the amount of \$2,353.77, also represented by a promissory note, dated July 1, 1961, is hereby disallowed. This latter instrument purportedly relates to some vague gift transaction between the claimant and the decedent which was never completed during the decedent's life. The undersigned is not prepared to obligate the payment of trust or restricted funds to complete this transaction where any contractual rights are extremely dubious due to lack of adequate consideration.

The trust or restricted estate of the decedent having been appraised at \$34,867.00, a probate fee of \$75.00 will be collected by the Superintendent or other officer in charge pursuant to authority found in the Act of January 24, 1923 (42 Stat. 1185).

Done at the City of Tulsa, Oklahoma, and dated August 31, 1966.

(Sgd.) Kent R. Blaine  

---

Kent R. Blaine  
Examiner of Inheritance

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
Office of the Solicitor  
Office of the Examiner of Inheritance  
712 Petroleum Building  
Tulsa, Oklahoma 74103

PROBATE  
H-173-66  
H-220-66  
KRB

IN THE MATTER OF THE  
ESTATE OF:  
George Chahsenah,  
deceased Comanche  
Unallottee

)  
)  
)  
)  
)  
PETITION FOR  
REHEARING DENIED

The above-named decedent's last will and testament was approved by the undersigned on August 31, 1966, Probate #H-173-66. On October 31, 1966, Dorita High Horse, Zelma Tselee, John H. Chahsenah, Garnett Tahsequaw, Betsy Lois Chahsenah (Tarsip), Earl Chahsenah, Strudwick Tahsequaw, Lydia Mae Tarsip, James Chahsenah and Albert Tahsequaw, Jr., filed a petition for rehearing under the provisions of 25 CFR 15.17.

The petitioners assert that the last will and testament dated March 14, 1963, was not a proper testamentary instrument, and the order approving it was in error as a matter of fact and as a matter of law. No specific errors of law are set forth; the petitioners' position, simply stated, is that the evidence does not support the factual conclusions reached by the undersigned regarding the testator's mental capacity at the time the will was made and executed.

The extensive evidence presented in this case was carefully considered prior to the initial ruling. It has again been reviewed in the light of the arguments set forth in the petition for rehearing. These arguments presented by the petitioners are not convincing, and the conclusions of law and facts set forth in the order dated August 31, 1966, remain unchanged.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by Section 1 of the Act of June 25, 1910 (36 Stat. 855), and other applicable statutes, and pursuant to 25 CFR 15, for the foregoing reason, the above-mentioned petition for rehearing is hereby denied.

This action on the petition for rehearing becomes final sixty (60) days from the date hereof. The petitioners may within this 60 day period (or within such additional period as the Secretary, for good cause may allow) file with the Superintendent, Anadarko Agency, Bureau of Indian Affairs, Anadarko, Oklahoma, a written notice of appeal to the Secretary of the Interior. Such notice of appeal shall state specifically and concisely the reasons for the appeal. Copies of the notice of appeal shall be furnished by the appellants to the Examiner of Inheritance and to all parties who share in the estate under the decision of the Examiner, and the notice of appeal shall contain a certification stating that this has been done. In addition, the appellants and any other interested party may, within 60 days from the date on which the notice of appeal is filed, submit written arguments to the Tulsa Regional Solicitor, U. S.

Department of the Interior, 712 Petroleum  
Building, Tulsa, Oklahoma.

Done at the City of Tulsa, Oklahoma, and  
dated November 16, 1966.

(Sgd.) Kent R. Blaine  
Kent R. Blaine  
Examiner of Inheritance

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
Office of the Solicitor  
TULSA REGION  
P.O. Box 3156  
Tulsa, Oklahoma 74101

IA-T-4

June 20, 1966

Estate of George	:	Probate H-173-66 and
Chahsenah, deceased	:	H-220-66
Comanche unallottee	:	Order approving will reversed

APPEAL FROM A DECISION OF A HEARING EXAMINER

Dorita High Horse and certain nieces and nephews of the decedent, George Chahsenah, appeal through counsel from an order of the Hearing Examiner, Tulsa, dated August 31, 1966, approving a will of the decedent, and from an order dated November 16, 1966, denying their petition for a rehearing.

The decedent died on October 11, 1963, at the age of 55 years, a resident of the State of Oklahoma, having never married and leaving no surviving parent, brother, or sister. He was survived by several nieces and nephews, most of whom are appellants herein, and by his daughter, Dorita High Horse, appellant herein, the paternity of whom the decedent had acknowledged on several occasions. The evidence supporting the Examiner's finding of fact that Dorita High Horse is decedent's daughter is virtually uncontradicted in the record

and is so convincing that this finding would be sustained on appeal if it had been contested, which it was not.

The record discloses that the decedent executed at least six wills dated successively November 27, 1956, in favor of a niece, Viola Atewooftakewa; March 19, 1957, in favor of a friend, Sammy Schwartz; May 21, 1959, in favor of a friend, Fred H. Benge; October 20, 1959, in favor of a nephew Strudwick Tahsequah; March 6, 1962, in favor of a cousin, Rosa May Wahahrockah; and March 14, 1963, in favor of a niece, Viola Atewooftakewa, and her three children, Frankie Lee Tooahnippah, Vila Tooahnippah and Julia Tooahnippah. None of these wills contains a reference to the daughter of the decedent, although the earliest purported will states that decedent had no children.

The record supports the Examiner's conclusion that, although the decedent's excessive drinking may have grown progressively worse during the last few years of his life, testimony to the effect that the decedent was "never sober" for a period of several years must be rejected as impossible to accept at face value. The record further supports the Examiner's conclusion that the decedent was not in an intoxicated condition at the time he executed the latest purported will dated March 14, 1963. It also supports strongly his further conclusion that when the decedent "'needed' or really wanted something to drink, he would promise, threaten, beg, or do whatever was necessary in an attempt to get alcohol."

The record contains no indication that the decedent ever made any personal effort to work or

earn any wages during his lifetime, but reflects that his principal income was the money he received, usually at monthly intervals, from the leasing of his restricted lands for oil, gas and agricultural purposes. These funds were usually spent within a few hours or days after he received them for intoxicants and for personal items, such as food-stuffs, which could, and often would, be subsequently traded for intoxicants during periods of temporary financial adversity. In order to purchase intoxicants during such periods, he often obtained advances of money from relatives or other associates, several of whom were named as devisees in his various purported wills, and repaid such loans when funds were subsequently received.

The Examiner concluded that the will dated March 14, 1963, met the technical requirements for a valid will and was not unnatural in failing to provide for the decedent's daughter as there was no evidence that the decedent had any close paternal ties to the daughter during the later part of his life. He thereupon approved the latest purported will of the decedent by an order dated August 31, 1966, apparently without considering whether the circumstances were such as to justify such approval as an exercise of the discretionary authority conferred upon the Secretary by 25 U.S.C. §373. The Secretary's responsibility is not adequately discharged when he, or an examiner acting for him, determines that a purported will meets the technical requirements for a valid dispositive instrument and thereupon, without further consideration, approves the will as a matter of course. When a purported will is submitted for approval and it has been determined that it meets the technical requirements for a valid will, further consideration must be given before

approving or disapproving it to determine whether approval will most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law. 1/

Since the record contains sufficient evidence of the relationship between the decedent and his heir-at-law and his devisees to ascertain whether approval of the will by the Hearing Examiner was an appropriate discharge of the Secretary's responsibility, consideration of the circumstances surrounding these persons will be given at this appellate level.

The decedent was the natural father of Dorita High Horse. The record reflects that during his lifetime the decedent's only contribution toward the welfare of his daughter was to participate in her conception, to acknowledge her status as his daughter, and to visit briefly with her on rare occasions when they would by accident meet on public streets. Before the daughter's birth, he abandoned the mother, with whom he had been living. Although marriage to the mother was not impeded by any existing or subsequent marriage to another woman, the decedent neglected to remain and maintain a home with the mother in order that the daughter would have the advantages of a normal home life during her childhood. Notwithstanding

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1/ Estate of Oliver Maynahonah, IA-T-1 (June 30, 1966), affirmed as Kadayso v. Udall, Civil Action 66-281, U.S. District Court, Western District of Oklahoma (February 14, 1967); Estate of Kosope (Richard) Maynahonah, IA-141 (October 28, 1954); and Estate of Frank (Oren F.) Simpkins, Osage Allottee No. 1879 (will disapproved December 1, 1943, application for reconsideration denied February 23, 1945).

the fact that the decedent received income from his restricted lands, he made no contribution toward the support or education of his daughter, leaving her to be supported by her mother, until she died when the daughter was six years old, and thereafter by a maternal aunt. The decedent's legal responsibility for the support of his daughter during her childhood could have been enforced by judicial action on her behalf to the extent, if any, that he had unrestricted income or assets, and the Secretary or his authorized representative probably would have honored reasonable requests on the daughter's behalf for contributions toward her support from the decedent's income from restricted lands. However, no action toward that end was taken by the decedent, by his daughter, or by others on her behalf.

If the decedent had died several years earlier leaving an orphaned minor daughter being raised by an aunt, any will disinheriting the daughter would be subject to disapproval because the estate would be needed for discharging his responsibility for supporting the child. The fact that the daughter had attained majority and married prior to the death of the decedent does not alter the fact that the decedent had an obligation to his daughter which was not discharged either during his lifetime or under the terms of his purported will. For this reason it is inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare by lending his approval to the decedent's will.

This decedent failed to make any appreciable effort toward discharging his responsibilities to his daughter during her childhood, and upon her attaining adulthood he attempted by will to devise

and bequeath to others such of his restricted assets as had not been dissipated. This he could do only if he possessed unrestricted power of testamentary disposition. His attempt to do so, however, was limited by the fact that the Secretary must exercise the discretionary responsibility of approving the will before it can become effective. Although the Examiner approved the will, this appeal from that approval requires the appellate authority to determine whether such approval was a reasonable exercise of the discretionary responsibility of the Secretary.

I hereby determine, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2a(3) (a), 24 F.R. 1348) and redelegated to the Regional Solicitor (Solicitor's Regulation 23, 31 F.R. 4631), that under the circumstances hereinbefore set forth the Secretary's approval of the purported will dated March 14, 1963, should not be given, the Examiner's approval is rescinded, and the will is hereby disapproved.

Each of the decedent's previous wills would receive similar disposition if offered for approval because each of them disinherits the decedent's daughter. It follows that no useful purpose would be served by additional hearings, for which reason the Examiner's denial of a petition for rehearing is not reversed. Accordingly, the entire estate of the decedent remaining after payment of allowed claims shall be distributed, without further order of the Examiner, to Dorita High Horse as the sole heir of the decedent.

(Sgd.) Raymond F. Sanford  
Raymond F. Sanford  
Regional Solicitor

# Supreme Court of the United States

No. 300 --- , October Term, 19 69

**James Toohimpah Tate, et al.,**

**Petitioners,**

**v.**

**Walter J. Michel, Secretary of the  
Interior for the United States, et al.**

ORDER ALLOWING CERTIORARI. Filed **October 13** ----- , 19 **69**.

The petition herein for a writ of certiorari to the United States Court of Appeals for the **Tenth** ----- Circuit is granted., **and the case is placed on the summary calendar.**

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED

JUN 28 1969

JOHN F. DAVIS, CLERK

In the  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1969

No. **300**

James Tooahimpah Tate,  
Vila Tooahnippah (Paddlety),  
Julia Tooahnippah (Goombi),  
and James Tooahimpah Tate,  
the duly qualified and acting  
Administrator of the Estate of  
Frankie Lee Tooahnippah,  
deceased,

*Petitioners,*

**VERSUS**

Walter J. Hickel, Secretary of  
the Interior for the United States,  
and Dorita High Horse,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE TENTH  
CIRCUIT**

Omer Luellen  
P. O. Box 96  
First State Bank Building  
Hinton, Oklahoma 73047

June, 1969

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In the  
Supreme Court of the United States  
OCTOBER TERM, 1969

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No. - - - - -

---

James Tooahimpah Tate,  
Vila Tooahnippah (Paddlety),  
Julia Tooahnippah (Goombi),  
and James Tooahimpah Tate,  
the duly qualified and acting  
Administrator of the Estate of  
Frankie Lee Tooahnippah,  
deceased,  
Petitioners,

VERSUS

Walter J. Hickel, Secretary of  
the Interior for the United States,  
and Dorita High Horse,  
Respondents.

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE TENTH  
CIRCUIT

---

To the Honorable, the Chief Justice and the  
Associate Justices of the Supreme Court of the  
United States:

Omer Luellen, Attorney for James Tooahimpah  
Tate, Vila Tooahnippah (Paddlety), Julia Tooahnippah  
(Goombi), and James Tooahimpah Tate, the duly

qualified and acting Administrator of the Estate of Frankie Lee Tocahhrippah, deceased, petitioners herein, respectfully request in their behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on March 3, 1969, and in which case the said Court entered its Order denying a Petition for Rehearing which order denying rehearing was entered on the 8th day of April, 1969.

CITATIONS TO OPINIONS BELOW

The administrative decision of the Examiner of Inheritance acting pursuant to delegated authority for the Secretary of the Interior dated August 31, 1966, is unreported; it is printed in the Appendix hereto at pages i-ix.

The Order Denying Petition for Rehearing of the Examiner of Inheritance acting pursuant to delegated authority for the Secretary of the Interior dated November 16, 1966, is unreported; it is printed in the Appendix hereto at pages x-xii.

The administrative decision of Raymond F. Sanford, Regional Solicitor acting pursuant to delegated authority for the Secretary of the Interior dated June 20, 1967, and which became the Secretary of the Interior's final order is unreported; it is printed in the Appendix hereto at pages xiii-xviii.

The report of the District Court decision in this matter, Atewooflakewa vs. Udall, D. C. Okla. 277 F. Supp. 464 (1967) is set out infra in the Appendix hereto at pages xix-xxix.

Order and Judgment of the United States District Court for the Western District of Oklahoma entered

by the District Court on the 28th day of December, 1967, granting Plaintiffs Cross Motion for Summary Judgment and denying Defendants Motion for Summary Judgment and Denying Intervenors Motion for Summary Judgment is unreported; it is printed in the Appendix hereto at pages xxx-xxxii.

The Report of the Circuit Court of Appeals decision in this matter, High Horse vs. Tate, 407 F.2d 394 (1969) is set out infra in the Appendix hereto at pages xxxiii-xxxv.

Order of the Circuit Court of Appeals denying Petition for Rehearing which Order was entered on the 8th day of April, 1969, is unreported; it is printed in the Appendix hereto at page xxxvi.

STATEMENT OF GROUNDS ON WHICH  
JURISDICTION IS INVOKED

This Court is requested to grant a writ of certiorari because the Court of Appeals for the Tenth Circuit has rendered a decision in conflict with decisions of the Court of Appeals for the District of Columbia Circuit as to whether judicial review can be given, under authority of 5 U.S.C. § 702 and 28 U.S.C. § 1361, of the approval or disapproval by the Secretary of the Interior of a will made by an Indian pursuant to the authority granted in 25 U.S.C. § 373. A Judgment was rendered on March 3, 1969, and an Order denying Petition for Rehearing was entered by the United States Court of Appeals for the Tenth Circuit on the 8th day of April, 1969.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED FOR REVIEW

The question herein presented is:

Is a decision of the Secretary of the Interior approving or disapproving the Will of an Indian made pursuant to 25 U.S.C. § 373 subject to review under the authority of 5 U.S.C. § 702 and 28 U.S.C. § 1361.

STATUTES INVOLVED

Title 5 U.S.C. § 702:

Right of Review

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Title 28 U.S.C. § 1361:

Action to compel an officer of the United States to perform his duty

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Title 25 U.S.C. § 372:

Ascertainment of heirs of deceased allottees;  
settlement of estates; sale of lands;  
deposit of Indian moneys

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies

before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: \* \* \*

Title 25 U.S.C. § 373:

Disposal by will of allotments held under trust

"Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless or until it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is

subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: \* \* \*

#### STATEMENT OF CASE

This case originated by the filing of a complaint by the Petitioners or their predecessors which complaint was filed in the United States District Court for the Western District of Oklahoma and was against Stewart L. Udall, the predecessor of the Respondent herein, Walter J. Hickel, Secretary of the Interior for the United States, and Dorita High Horse was allowed to file a plea in intervention.

The Complaint of the Petitioners requested the Court to review, reverse, and set aside the decision and Order of Stewart L. Udall, Secretary of the Interior entered on the 20th day of June, 1967, by the Secretary of the Interior, which Order by the Secretary of the Interior disapproved the Will of George Chahsenah dated March 14, 1963, and which Order stated that the Secretary of the Interior did not give his approval to the said Will and the approval of the said Will heretofore given by the Examiner of Inheritance was to be rescinded. The Petitioners further prayed in their Complaint that the Secretary of the Interior be directed to approve the probate of the Will of George Chahsenah dated March 14, 1963, and to Decree distribution of his estate according to the terms of said Will, and that the Petitioners have all other relief proper in law and equity.

The Order of the Secretary of the Interior entered on June 20, 1967, arose in the following manner.

On March 14, 1963, George Chahsenah made a will bequeathing and devising his property to the Petitioners herein and George Chahsenah, who was a Comanche Indian, died on the 11th day of October, 1963, at the age of approximately 55 years, which death occurred approximately six (6) months from the execution of his will dated March 14, 1963. The Examiner of Inheritance for the Secretary of the Interior acting pursuant to delegated authority approved the Will of George Chahsenah dated March 14, 1963, which approval of said Will was made on the 31st day of August, 1966, and a Petition for Rehearing was denied on November 16, 1966, by the Examiner of Inheritance.

Dorita High Horse and certain nieces and nephews of the decedent, George Chahsenah, perfected an appeal to the Secretary of the Interior from the decision of the Examiner of Inheritance and on appeal pursuant to delegated authority, the Regional Solicitor for the Tulsa Region of the Office of the Solicitor for the Department of the Interior, issued an Order on June 20, 1967, disapproving the Will of the decedent, George Chahsenah, which Order by the Regional Solicitor was the final administrative decision of the Secretary of the Interior relative to the approval or disapproval of the said Will. The said Order issued on June 20, 1967, stated that the Secretary of the Interior was withholding his approval of the purported Will because the decedent, George Chahsenah, had made no effort during his lifetime to support his illegitimate daughter and therefore, there was not a just and equitable treatment of the decedents heir at law, namely, Dorita High Horse. The Regional Solicitor speaking for the Secretary

of the Interior stated that by the exercise of his discretionary responsibility he could disapprove the Will of the decedent, which disapproval was in fact consummated by the Secretary of the Interior giving as his reasons for said disapproval the reasons aforestated.

Judge Eubanks rendered his Memorandum Opinion after the Complaint had been filed herein requesting that the Secretary of the Interior be directed to approve the Will of the said decedent Indian and distribute his estate according to the terms of his Will. Judge Eubanks, in his Memorandum Opinion, Appendix xix-xxix found that the denial of the approval of the last Will and Testament of George Chahsenah by the Secretary of the Interior lacked rational basis and was an arbitrary and capricious denial of the right conferred upon an Indian by Congress to make his last Will and Testament. A judgment was rendered by District Judge Eubanks ordering and directing that the last Will and Testament dated March 14, 1963, of George Chahsenah, a deceased Comanche Unallottee Indian, be approved by the Secretary of the Interior, and Judge Eubanks further ordered that the Estate of the said Indian be distributed in accordance with the terms of the last Will of the said decedent.

An appeal was taken to the Circuit Court of Appeals for the Tenth Circuit by Stewart L. Udall, Secretary of the Interior, and by Dorita High Horse, Intervenor. The Court of Appeals following its decision in Heffelman vs. Udall 378 F. 2d 109 (1967) and Attocknie vs. Udall 390 F. 2d 636 (1968) Cert. den. October 14, 1968, vacated the Judgment of the trial Court and remanded the case with directions to dismiss the action and complaint for want of jurisdiction. An examination of Heffelman vs. Udall Supra and Attocknie vs. Udall Supra will reveal that the United States Court of Appeals for

the Tenth Circuit has held that 25 U.S.C. 373 complements 25 U.S.C. 372 and where 25 U.S.C. 372 states that the decision of the Secretary of the Interior in ascertaining the heirship of a deceased Indian shall be final and conclusive and is therefore not subject to a review under the Administrative Procedure Act or other applicable Statutes; the same reasoning applies to 25 U.S.C. 373. The Circuit Court for the Tenth Circuit in said opinions stated that even though 25 U.S.C. 373 does not contain a statement that the decision of the Secretary of the Interior in the approving or disapproving of the Will of a deceased Indian shall be final and conclusive, Congress intended that there should be no legal review under 25 U.S.C. 373 of the decision of the Secretary of the Interior in approving or disapproving the Will of an Indian, and therefore, the decision of the Secretary was final and conclusive and the District Court for the Western District of Oklahoma did not have jurisdiction under the Administrative Procedure Act or under any other applicable Statute to review the decision of the Secretary of the Interior and the original Complaint asking judicial review of the action of the Secretary of the Interior should be dismissed for lack of jurisdiction.

Your Petitioners request this Court to grant a Writ of Certiorari to review the decision of the Circuit Court of Appeals in this case, which decision held that the approval or disapproval by the Secretary of the Interior of a Will of an Indian made pursuant to 25 U.S.C. 373 is final and conclusive and not subject to judicial review pursuant to the Administrative Procedure Act 5 U.S.C. 701 or pursuant to any other applicable Statute.

REASONS FOR ALLOWANCE OF WRIT

Your Petitioners believe that it will occasion no surprise to this Court that the decisions of the Circuit Court of Appeals for the Tenth Circuit in the case of your Petitioners and in other similar cases are in conflict with the decisions from other Circuits and particularly from the Circuit Court of Appeals for the District of Columbia, which conflict pertains to whether or not judicial review is permissible under the A.P.A. and other applicable Statutes of the approval or disapproval of the Will of an Indian by the Secretary of the Interior under Section 2 of 1910 Act (25 U.S.C. 373).

Your Petitioners further state that the first case involving the problem under consideration is *Homovich vs. Chapman*, 191 F.2d 761, which decision was rendered by the United States Court of Appeals for the District of Columbia Circuit on June 21, 1951. In this case, the Secretary of the Interior maintained that Wills of Indians were not reviewable by the Courts because Section 1 of the 1910 Act dealing with the determination of the heirs of an Indian who died without a Will provides that his determination shall be "Final and Conclusive" and therefore Section 2 dealing with Wills must be read as though it contained a similar provision, although in fact it does not contain such a provision. Circuit Judge Prettyman disagreed with the position of the Secretary of the Interior and he stated that it was plain to him that if Congress had meant that the decisions of the Secretary of the Interior under Section 2 should be final and conclusive, Congress would have said so and, consequently, the approval or disapproval of a Will of an Indian by the Secretary of the Interior was subject to judicial review under the Administrative Procedure Act. Judge Prettyman further stated that the fact that the acts of the

Secretary in providing regulations for the execution of Wills of Indians and regulations in regard to the approval of same require the exercise of discretion and judgment on the part of the Secretary of the Interior; nevertheless, this fact does not preclude judicial review of the action of the Secretary of the Interior in approving or disapproving the Will of an Indian.

Your Petitioners further state that the next applicable case for the problem under consideration is Hayes vs. Seaton, 270 F.2d 319, Cert. Den 364 U.S. 814, which decision was rendered by the United States Court of Appeals for the District of Columbia Circuit on July 9, 1959. The opinion by the majority of the Court was rendered by Circuit Judge Edgerton and a dissenting opinion in conformity with the position of your Petitioners herein was rendered by Circuit Judge Burger. The opinion of the majority held that under the authority of 25 U.S.C. 372 the decision of the Secretary that an Indian who disappeared without being thereafter heard from in year before the Indians father died leaving Will giving residue of property to said Indian who had disappeared had survived his father so that the property of the father and the property of his son went to the sons heir was final and conclusive and the majority opinion held that even though the father had made a Will there could be no legal review of the disposition of the fathers estate pursuant to his Will. Judge Burger in a detailed and persuasive dissenting opinion takes the position that 25 U.S.C. 373 does not complement 25 U.S.C. 372 and your Petitioners presume that the Court will take cognizance of the fact that 25 U.S.C. 372 is cited as Section 1 of the 1910 Act and 25 U.S.C. is cited as Section 2 Of the 1910 Act.

In his dissenting opinion, Judge Burger stated as follows:

"In other words, the Examiner made a finding with respect to the son's Section 1 estate, and then in disposing of the father's Section 2 estate, merely adopted this finding without further consideration. Nevertheless, it is clear that a finding as to the date of the son's death is essential to the disposition of both estates. That this finding was arbitrarily borrowed by the Examiner when he made his determination as to the Section 2 estate has no bearing on whether the court can or cannot review that determination. If the statute permits any judicial review of a Section 2 determination, as we held it did in *Homovich v. Chapman*, 1951, 89 U. S. App. D.C. 150, 191 F.2d 761, that review is not foreclosed by the fact that the particular finding which a party attacks was adopted from another and perhaps unreviewable proceeding.

Nor do I agree with the majority when they say that Section 2 has no relevance because it merely gives the Secretary authority to 'approve' Indian wills. The Examiner determined who should inherit the property of John Thomas under his will. The authority to make such a determination must be found in Section 2 or else it does not exist. Section 1 does not give the Secretary any such authority: it deals only with intestate property. Section 2, which conferred upon John Thomas the right to devise property in accordance with the Secretary's regulations, thereby implicitly gave the Secretary authority to resolve the present dis-

pute which arises from an exercise of that statutory right. This authority has been exercised in this case, and seems to me subject to judicial review under *Homovich v. Chapman*, *supra*.

To summarize, the fact that the District Court may perhaps not have power to review the Secretary's Section 1 decision concerning the son's estate alone is irrelevant insofar as a Section 2 decision is concerned, and all judicial review should not be foreclosed simply because the dispositive finding is present in both decisions below. The Secretary argues that this may lead to 'the absurd result of contradictory findings of the same fact.' This argument is not convincing because, if the court should reverse one of the Secretary's determinations while not passing on the other, it has not thus prevented the Secretary himself from subsequently reviewing that decision which has been left untouched by the court. The problem of 'contradictory findings' is within his power to correct. Absent a clear legislative expression making unreviewable an administrative action of this character, courts should be reluctant to find lack of jurisdiction. See *Monongahela Bridge Co. v. United States*, 1910, 216 U.S. 177, 195, 30 S. Ct. 356, 361, 54 L.Ed. 435;<sup>2</sup> *The King v. Plowright*, 3 Mod. 94, 87 Eng. Rep. 60 (K.B.1686); 4 Davis, *Administrative Law Treatise* ch. 28 (1958).

Professor Jaffe has stated the general principle thusly: '(I) n our system of

remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity.' Jaffe, *The Right to Judicial Review*, 71 Harv.L.Rev. 401, 420 (1958). \* \* \*

Section 10 (e) of the A.P.A. lays down broad general guides for the scope of review. These guides only infrequently answer specific problems as posed by actual cases. As Professor Davis has put it, 'the degree of intensity of review is not necessarily susceptible of embodiment in a word formula.'<sup>4</sup> Yet we do find guides consistent with Section 10 (e) of the A.P.A. in a phrase that runs through the cases: an administrative decision should be upheld unless it is not supported by substantial evidence on the record considered as a whole. See *Universal Camera Corp. v. N. L. R. B.*, 1951, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456.<sup>5</sup> *Homovich v. Chapman* certainly did not intend to deviate from these established general formulas. If anything, the spirit as distinguished from the letter of that case tends to a broadening of the scope of review. This is clearly indicated by the court's holding there that Section 10 of the A.P.A. is applicable to cases arising under Section 2 of the 1910 Act." \* \* \*

(Footnotes deleted).

Your Petitioners further state that the next applicable case for the problem under consideration

is Asenap vs. Huff, 312 F.2d 358, which decision was rendered by the United States Court of Appeals for the District of Columbia Circuit on December 20, 1962, in a Per Curiam opinion. In Asenap vs. Huff Supra, the Circuit Court of Appeals for the District of Columbia again reviewed the decision of the Secretary of the Interior and took jurisdiction for legal review of the decision of the Secretary of the Interior in approving or disapproving the Will of an Indian pursuant to 25 U.S.C. 373. The Court in the opinion it rendered held that the decision of the Secretary in approving the Will of the said Indian in question was not arbitrary and capricious and that the decision of the Secretary was supported by the record and the Court granted summary judgment in favor of the Defendant Secretary and certain intervenors.

Your Petitioners further state that the Per Curiam opinion of Asenap vs. Huff, Supra was relative to the Estate of Wook-Kah-Nah, Comanche Allottee No. 927 which estate is set out in the Interior decisions under the following citation: 65 I.D. 436. This decision was rendered by the acting Solicitor for the Department of the Interior on October 21, 1958, wherein on Appeal, he approved the decision of the Examiner of Inheritance, who had approved in the hearing before him, the last Will and Testament of Wook-Kah-Nah. Wook-Kah-Nah left as her heirs at law, six children and two grandchildren and in her Will she gave the lands on which there were valuable oil wells to two of her children. In other words, two of her children were favored far beyond the rest of her children. It was brought out at the hearing that she was an

illiterate woman who could not read or write, but nevertheless, the acting Solicitor of the Department of the Interior approved the Will and he made the following statement in his Opinion approving the Will and in approving the Opinion of the Examiner of Inheritance:

"It is apparent from the record that the testatrix, Wook-Kah-Nah, knew each of her children and was aware of each one's financial status; she knew in a general way all of her properties and which were of greater value; she knew that she was receiving large royalty payments from the oil produced from her own allotment and she had a definite plan for the distribution of her estate in a manner which she believed would best meet the needs of her children and satisfy her own desires. It is evident that the testatrix demonstrated a sufficient capacity to satisfy the requirements for the validity of her will made of February 20, 1954."

Your Petitioners further state that if the Solicitor would have desired to use the equity theory (which was used in your Petitioners case), he could have withheld the approval of the Will of Wook-Kah-Nah and he could have stated that equity would be disbursed more evenly if the oil runs were disbursed among her children instead of going to two of her children as her Will provided.

Your Petitioners further state that Heffelman vs. Udall, 378 F.2d 109 (1967) was a decision rendered by the United States Court of Appeals for the Tenth Circuit on May 24, 1967. Circuit

Judge Lewis issued an opinion which stated that Section 1 of the 1910 Act (25 U.S.C. 372) establishes the finality of the Secretary's determination of heirship under intestacy. Judge Lewis further stated as follows:

"We think that as long as an Indian allotment remains subject to the Secretary's control, cf. *Hanson v. Hoffman*, 10 Cir., 113 F.2d 780, sections 1 and 2 of the Act of 1910 should be viewed as complementing each other with respect to the finality of the administrative determination of facts. We accordingly conclude that such a determination comes within the jurisdictional exception stated in section 10 of the Administrative Procedure Act."

Your Petitioners further state that in their opinion, the *Heffelman* case is the first case that definitely held that Section 1 of the 1910 Act and Section 2 of the 1910 Act complement each other and therefore because determination of heirship under Section 1 is final and conclusive, the same reasoning applies to Section 2 and the approval or disapproval of a Will of an Indian by the Secretary of the Interior is final and conclusive and not subject to judicial review even though Section 2 does not contain the final and conclusive prohibition.

Your Petitioners further state that the next decision rendered concerning the direct point under consideration by a Circuit Court is the case of *Attocknie vs. Udall*, 390 F.2d 636 (1968), which decision was rendered on March 14, 1968, by Circuit Judge Seth of the Circuit Court of Appeals for the Tenth Circuit. Judge Seth stated in said opinion that *Heffelman vs. Udall*,

378 F.2d 109, 10th Circuit had already held that judicial review of the administrative decision relating to the distribution of the Estate of an Indian is not permitted under the A.P.A. and therefore there is no jurisdiction for the Courts to give judicial review to the approval or disapproval of the Will of an Indian by the Secretary of the Interior under Section 2 of the 1910 Act (25 U.S.C. 373) and the Court therefore ordered the complaint dismissed for lack of jurisdiction.

The next Circuit Court decision, of course, is the decision rendered by the Tenth Circuit in the case of your Petitioners, which decision was rendered in High Horse vs. Tate, 407 F.2d 394 (1969) in a Per Curiam opinion issued on March 3, 1969. This opinion is in the Appendix at pages xxxii-xxxv and the Tenth Circuit Court of Appeals again held that under the authority of Heffelman vs. Udall, 378 F.2d 109 (1967) and Attocknie vs. Udall, 390 F.2d 636 (1968), cert. den. 393 U.S. 833, 89 S. Ct. 104, 21 L.Ed. 2d 104, 1968, the Court does not have jurisdiction to review the decision of the Secretary of the Interior in approving or disapproving the Will of an Indian executed pursuant to Section 2 of the 1910 Act (25 U.S.C. 373) and the judgment of the trial Court was vacated and the case remanded with directions to dismiss the action for want of jurisdiction.

Your Petitioners further state that there is a direct conflict between the decisions of the Circuit Court of Appeals for the District of Columbia and the Circuit Court of Appeals for the Tenth Circuit relative to whether or not judicial review can be granted under the A.P.A. and other applicable Statutes of the approval or disapproval of an Indians Will by the Secretary of the Interior

pursuant to Section 2 of the 1910 Act (25 U.S.C. 373), and this conflict has been outlined by your Petitioners in the cases heretofore cited under the part of this Petition designated "Reasons for Allowance of Writ".

Your Petitioners further state that this Court has firmly established that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress and this Court has echoed this theme by noting that the Administrative Procedure Acts generous review provisions must be given a hospitable interpretation, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S. Ct. 1507, 1511, 18 L. Ed 2d 681 (1967), *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51, 75 S. Ct. 591, 594, 99 L.Ed. 868, *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 433-435, 69 St. Ct. 1410, 1414-1415, 93 L.Ed. 1451; *Brownell v. We Shung*, 352 U.S. 180, 77 S. Ct. 252, 1 L.Ed. 2d 225; *Heikkila v. Barber*, 345 U.S. 229, 73 S. Ct. 603, 97 L.Ed 972.

Your Petitioners further state that the Courts show "great deference to the interpretation given (a) statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13 L.Ed 2d 616; *Gardner v. Brian*, 369 F.2d 443 (10 Cir.). Your Petitioners further state that the Bureau of Indian Affairs and the Secretary of the Interior originally interpreted that the Secretary of the Interior was without the authority to change the provisions of the Will of Indian, and your Petitioners wish to cite as authority for this interpretation the 1958 revision

of the Indian Law Book published under the authority of the United States Department of the Interior at Page 813. In the 1958 revision the said law book states as follows:

"The authority of the Secretary of the Interior is limited to approval or disapproval of an Indian will, and he is without authority to change the provisions of the will by making a different provision than that provided by the testator."  
(Memo Sol. I. D., May 10, 1941.)

Your Petitioners further state that the Solicitors Memorandum of May 10, 1941, referred to is as follows:

"UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON

May 10, 1941

MEMORANDUM for the Assistant Secretary.

The attached letter to the Secretary, dated April 28, recommended disapproval of the will of William Smith, deceased Nez Perce Allottee No. 157 of the Northern Idaho Agency. The only reason given for disapproval of the will is that the will 'does not conform with Secretary's Order No. 420, dated August 14, 1933, prohibiting, except under certain circumstances, the alienation of Indian lands and the issuance of patent in fee.' That order forbids, with certain exceptions, the sale of restricted or Indian trust

lands and the removal of restrictions from such lands by issuance of certificates of competency, patents in fee, or orders removing restrictions. It has no application to testamentary disposals of Indian property.

The record shows that the testator was of sound and disposing mind at the time of the execution of his will. No evidence whatever of fraud, duress, undue influence or other imposition is contained in the record. The testator devised certain inherited interests having a value of about \$900 to Louie J. Grende, a white man. Specific devises are also made to Matilda Fleet, a Spokane Indian, and Maud Jennings, half-sister and closest living relative of the testator who is also made sole residuary devisee and legatee. In a written statement made contemporaneously with the will, the testator was careful to explain his reasons for these dispositions. According to that statement the devise to Grende was made because Grende had provided him with a home and had taken good care of him. The devise to Matilda Fleet was made because the subject of the devise was the allotment of Matilda's father and Matilda already had an interest in it. The devise to Maud was made because he wanted her to have all of his inherited interest on the Coeur d'Alene Reservation. If the will be disapproved, all of these stated desires of the testator will be defeated. Matilda who is not a heir will take nothing. Grende, the white man, would likewise take nothing as an heir but in recognition of services rendered to him by the decedent it is proposed to allow a claim in his behalf against the estate in

the amount of \$600. Maud, while an heir, would have to share the land interests intended to be given her with others. Finally, five people not intended to be objects of the testator's bounty would be given a one-tenth interest each in the entire estate.

The act of June 25, 1910 (36 Stat. 856), as amended, declares that any person having restricted lands or other restricted or trust property, 'shall have the right \*\*\* to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior' with the proviso that no such will shall have any validity unless approved by the Secretary. The right to make a will is thus conferred on the Indian not on the Secretary. Whatever discretion the Secretary may have in the matter of approving or disapproving the will, it is clear that this discretion should not be exercised to the extent of substituting his will for that of the testator. Such would clearly be the effect of disapproval in the present case. The naming of a non-Indian as one of the beneficiaries obviously is not a valid objection to approval of the will in the absence of fraud or other imposition, which clearly is not present.

I recommend that the will be approved.

For the Solicitor,

/s/ W. H. Flanery,  
Chief of Division.

Approved and referred to the  
Commissioner of Indian Affairs: May 12, 1941  
/s/ Oscar L. Chapman  
Assistant Secretary."

Your Petitioners further state that the refusal of the Secretary of the Interior to approve the Will of the decedent Indian herein for equitable reasons amounted to the Secretary of the Interior substituting his will for that of the Indian and is not permissible pursuant to the Solicitor's Memorandum of May 10, 1941, heretofore set out.

Your Petitioners further state that the statement in Heffelman vs. Udall, 378 F. 2d 383 (1967) Tenth Circuit that Sections 1 and 2 of the Act of 1910 complement each other is a false premise.

Your Petitioners further state that the validity of this statement that the said premise is false can be verified by the authority of the 1958 revision of the Indian Law Book published by the United States Department of the Interior at Pages 122 and 123 in said Law Book, which states as follows:

"The act of June 25, 1910 (36 Stat. 855), constituted what is probably the most important revision of the General Allotment Act that has been made. Based on 33 years of experience in the administration of the act, it sought to fill gaps and deficiencies brought to light in the course of that period. These related particularly (a) to the administration of estates of allottees, (b) to the making of leases and timber contracts for allotted lands, and (c) to the cancellation or relinquishment of trust patents.

Section 1 of this act (25 U.S.C. 372) set forth a comprehensive plan for the administration of allottees' estates, conferring plenary authority upon the

Secretary of the Interior to administer such estates and to sell heirship lands. Section 2 (25 U.S.C. 373) authorized testamentary disposition of allotments with the approval of the Secretary of the Interior and the Commissioner of Indian Affairs. Section 3 (25 U.S.C. 408) permitted relinquishment of allotments by allottees in favor of unallotted children, who had been completely ignored in the original scheme of allotment to living Indians.

Section 4 of the act (25 U.S.C. 403) permitted leasing of Indian allotments held by trust patent for periods not to exceed 5 years in accordance with regulations of the Secretary of the Interior, and conferred upon the Secretary power to supervise or expend for the Indians' benefit the rentals thereby received. Section 5 (25 U.S.C. 202) made it unlawful to induce an Indian to execute any conveyance of land held in trust, or interests therein. Section 6 (18 U.S.C. 1153, 1156) contained various provisions for the protection of Indian timber against trespass and fire. Section 7 (25 U.S.C. 407) contained a general authorization for the sale of timber on unallotted lands under regulations prescribed by the Secretary of the Interior. Section 8 (25 U.S.C. 406) contained a similar authorization for timber sales on restricted allotted lands.

Section 13 of the act (43 U.S.C. 148) authorized the Secretary of the Interior to

reserve from entry Indian power and reservoir sites, and the following section (25 U.S.C. 352) authorized the Secretary of the Interior to cancel patents of equal value and reimbursing the Indian for improvements on the canceled allotment. Other sections contained minor amendments to the General Allotment Act and related legislation.

The provision of this act relating to testamentary disposition of allotments was amended and amplified by the act of February 14, 1913 (25 U.S.C. 373). As amplified, the privilege of testamentary disposition subject to departmental approval was extended not only to Indians possessed of allotments, but also to Indians having individual Indian moneys or other property held in trust by the United States.

Your Petitioners further state that the argument that Section 1 of the Act of 1910 complements Section 2 of the Act of 1910 is not a valid argument, and your Petitioners further state that each separate section stands on its own contents and it is illogical to presume that the final and conclusive clause in Section 1 of the 1910 Act complements the various other numerous sections of the 1910 Act.

Your Petitioners further state that the Will of the decedent Indian herein was executed in all respects in accordance with the applicable laws and regulations (applicable regulations are found in Appendix xxxvii-xxxviii. Dorita High Horse and certain other parties made a desperate effort to discredit the factum of the Will of the

decedent Indian, but they were unsuccessful. On appeal, the Secretary of the Interior acting by and through the Regional Solicitor by delegated authority withheld approval of the Indians Will for equitable reasons with the end result that the entire estate of the decedent Indian descends and vests in Dorita High Horse instead of the devisees and legatees to whom the property was devised and bequeathed by the decedent Indian in his Will.

Your Petitioners further state that the trial Court had considerable doubt as to the paternity of Dorita High Horse which doubt was cogently set out by District Judge Eubanks in a footnote of his Memorandum Opinion which footnote can be found on page xxiv of the Appendix.

Your Petitioners further state that the decedent Indian was given the right to make his will by Congress and it was never the intent and purpose of Congress to give the Secretary of the Interior the arbitrary authority to disapprove the Will of an Indian for equitable reasons. Your Petitioners give as an illustration the example of the Secretary of the Interior giving as his reason for disapproving the Will of the decedent Indian a statement that the decedent Indian was a member of the Apache Tribe of Indians and that the Apache Indian Tribe had always been a murderous group of Indians and therefore any Will executed by an Apache Indian should not be and would not be approved by the Secretary of the Interior. Your Petitioners further believe that all Courts would take jurisdiction under such a factual situation and particularly under the authority of 28 U.S.C.

§1361 and thereby direct the Secretary of the Interior by an order in the nature of a mandamus to approve the Will of the decedent Indian if his only reason for disapproving the Will of the decedent Indian was the reason as stated that the decedent Indian was a member of the Apache Tribe of Indians.

Your Petitioners further state that the equitable reason given by the Secretary of the Interior acting by and through the Regional Solicitor for the disapproval of the decedent Indians Will in this case was not a valid or legal reason for the failure to approve the Will of the decedent Indian, therefore by the arbitrary denial of the right of the Indian to make a Will and have same approved, the Secretary of the Interior was subject to an Order to approve said Will in the nature of a mandamus as he was directed and ordered to so do by the Trial Court herein, pursuant to the jurisdiction granted by 28 U.S.C. § 1361 and even though if the final and conclusive clause of 25 U.S.C. 372 keeps A.P.A. from applying, the Courts herein could order approval of the Will under jurisdiction granted by 28 U.S.C. 1361 as was done and ordered by the Trial Court herein.

Your Petitioners further state that your Petitioners case can further be distinguished from Heffelman vs. Udall supra and Attocknie vs Udall supra because in those cases the Court did not take jurisdiction under 28 U.S.C. 1361 which the Trial Court did in your Petitioners case.

Your Petitioners further state that a very persuasive article, which your Petitioners believe supports their position in regard to 28 U.S.C. 1361 is an article by Byse and Fiocca, § 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action. 81 Harv. L. Rev. 308 (1967).

Your Petitioners further state that Byse and Fiocca at Page 351 of the Harvard Law Article definitely states that Section 1361 was intended to be jurisdictional, and your Petitioners further state that 1361 being jurisdictional can be used as jurisdiction in your Petitioners case if this Court should rule that the final and conclusive Section of 25 U.S.C. 372 applied to and complements 25 U.S.C. 373.

Your Petitioners further state that Ashe v. McNamara, 355 F.2d 277 (1st Cir.) further confirms the position of your Petitioners that 28 U.S.C. 1361 can be used for jurisdictional authority which case also pertains to "final and conclusive" and the Court held that final and conclusive of Article 76 of the Uniform Code of Military Justice did not prevent legal review under 28 U.S.C. 1361.

Your Petitioners in summary state that final and conclusive should not apply to 25 U.S.C. 373 and judicial review under the A.P.A. is permissible and the Circuit Court of Appeals for the District of Columbia holding accordingly should be confirmed by this Court and the conflict between the Court of Appeals for the District of Columbia and the Court of Appeals for the Tenth Circuit should be

resolved, and your Petitioners further state that this Court should further find that 28 U.S.C. 1361 can be used as jurisdictional authority for situations where the administrative agency acts in an arbitrary and capricious manner as was done herein according to the holding of the Trial Court herein.

Your Petitioners further state that Abbott Laboratories vs. Gardner Supra which held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress," greatly expands the category of Plaintiffs who have standing to demand non-statutory review when applied to persons aggrieved or adversely affected and your Petitioners are greatly aggrieved persons and adversely affected persons and should be granted jurisdictional review.

Wherefore, your Petitioners pray that a Writ of Certiorari be granted and issued by this Court to review the judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case.

Omer Luellen  
P.O. Box 96  
First State Bank Building  
Hinton, Oklahoma 73047

Attorney for Petitioners

June, 1969

## APPENDIX

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
Office of the Solicitor  
Office of the Examiner of Inheritance  
712 Petroleum Building  
Tulsa, Oklahoma 74103

PROBATE  
H-173-66  
KRB

IN THE MATTER OF THE	)	
ESTATE OF:	)	ORDER APPROVING
George Chahsenah,	)	WILL AND DECREE-
deceased Comanche	)	ING DISTRIBUTION
Unallottee	)	

This case coming on to be heard before the Examiner of Inheritance, Office of the Solicitor, Tulsa, Oklahoma, and upon submission of the evidence, the following facts and conclusions of law are presented.

Four separate formal hearings were held in this estate. Notices of the first hearing were duly served upon the known probable heirs, devisees and other interested parties prior to that hearing by mailing a copy of such notice to each of them at their last known mailing address, and by posting a notice at five public places within the vicinity of the Anadarko Agency of the Bureau of Indian Affairs in Oklahoma, for 20 days or more prior to such hearing. Notices of the supplemental hearings were mailed to all known interested parties, or their attorneys of record, at least twenty days prior to scheduled hearings.

## Appendix 11

These hearings were concluded at Anadarko, Oklahoma, on December 9, 1965, for the purpose of ascertaining the heirs at law of this decedent and the facts and circumstances surrounding the execution of an instrument in writing, dated March 14, 1963, purporting to be his last will and testament.

The evidence adduced at these hearings disclosed that the decedent died on October 11, 1963, at the age of approximately 55 years, a resident of the State of Oklahoma. Beyond this, there are relatively few undisputed questions of fact or law. Dorita High, Kiowa-Comanche Unallottee, claims to be a surviving daughter, and, therefore, his sole heir at law. This is denied by the fifteen nieces and nephews who appear to be his heirs at law - if Dorita High is not his daughter. The majority of these nieces and nephews, and Dorita High, contend that the decedent was mentally incompetent to execute a valid last will and testament on March 14, 1963, and that the purported testamentary instrument executed on that date is not entitled to Departmental approval.

The evidence does establish that the decedent was never married, and that he had no surviving parent, brother or sister. Under the provisions of the Act of February 28, 1891, 26 Stat. 795, Dorita High would be an heir at law, if she is a daughter of this decedent, irrespective of any recognized marriage between her parents. On August 31, 1949, the decedent signed a sworn statement acknowledging that Dorita High was his daughter. On November 27, 1956, the decedent made a will stating that he had no children. The testimony of the numerous witnesses in this matter is equally inconsistent as to what the decedent did or said regarding this paternity question. Bearing in mind the apparent interest of some of the witnesses who testified on this question, their credibility, based on the personal observation of the undersigned, and the issues involved when the above-mentioned written instruments were

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made, it is hereby found that Dorita High is, in fact, a daughter of this decedent. Therefore, under the laws of the State of Oklahoma and applicable Federal statutes, she would be the sole heir at law in the estate if the decedent had died intestate.

The decedent's trust or restricted property consists of interests in three Comanche allotments which are hereinafter described, and are situated in Oklahoma under the jurisdiction of the Anadarko Agency of the Bureau of Indian Affairs.

By the terms of the decedent's last will and testament, he makes specific devises to his niece, Viola Atewooftakewa, and to three of her children: Frankie Lee Tooahnippah, Vila Tooahnippah, and Julia Tooahnippah. The same four devisees are also the residuary beneficiaries who would share equally in any property not covered by the specific devises.

The evidence shows that the decedent's last will and testament was prepared by an attorney who, at that time, was employed by the Department. The scrivener and attesting witnesses, at the time this instrument was made, executed an affidavit showing that the will was properly made and executed when the decedent was of sound and disposing mind and memory and not acting under undue influence, fraud, duress or coercion. They could not recall this particular instrument or the decedent when they testified in this matter, but nothing was presented which would cast any doubt on their honesty, belief, or views as expressed in the affidavit.

The contestants of this will urge that from some date in the early 1940's, the decedent drank whisky, wine or other alcoholic beverages to an excess. Further, that this drinking pattern was progressive and that as the result of this excess use of alcohol, coupled with ill health, his mind was so deteriorated that he was mentally incompetent to make a valid testamentary disposition of

## Appendix lv

his property on March 14, 1963. While the evidence as to the nature and extent of the decedent's drinking pattern is extremely conflicting, the applicable rule of law is not. This Department has held in the Estate of Harris Eugene Russell, 70 I.D. 151, decided May 2, 1963, that the burden of proving mental capacity due to ill health and prolonged use of intoxicants is upon the contestant, and the testimony of law witnesses, who were not present when the will was made, is insufficient to meet this burden. This Russell case, wherein the initial ruling accepted a position similar to that asserted by the contestants, is distinguishable from the present case only in that the facts of chronic alcoholism coupled with diabetes were established to the satisfaction of the Superintendent of the Osage Indian Agency who made the findings of fact. In this case, the undersigned does not believe the evidence supports the factual conclusions which existed in the Russell case.

Several of the contestants and interested witnesses appearing on their behalf, testified that the decedent was always drunk during the last several years of his life. Other witnesses, whose interest in the matter was not established, also testified that they never saw the decedent sober during this same period. Without commenting on the credibility and knowledge of each individual witness, the following general observations seem applicable to all of this testimony. No one disputes the fact that this decedent drank to an excess - often and over an extended period of time.

The undersigned has no difficulty in accepting the fact that the decedent's excessive drinking may have grown progressively worse during the last few years since this appears to be

## Appendix v

consistent with the pattern followed by all who use alcohol to an excess. On the other hand, it is impossible to accept at face value, testimony to the effect that he was "never sober" for a period of several years. Likewise, the undersigned would reject the idea that employees of the Field Solicitor's Office, past, present or future, would knowingly participate in the preparation and execution of a will for an intoxicated person. Further, it should be noted that drunken behavior stands out in every way from "normal, non-intoxicated behavior". It follows, therefore, that recollection of individual witnesses would naturally favor those experiences wherein alcohol was involved. If these general observations tend to favor validity of this will, one final general observation which might support an opposing view should be made. The contestants testified that when the decedent "needed" or really wanted something to drink, he would promise, threaten, beg, or do whatever was necessary in an attempt to get alcohol. This same testimony indicates that his relationship to friends and relatives was very often controlled by his drinking pattern at that time. This testimony is accepted as true for the same reason that other general conclusions in the paragraph are accepted. Such testimony is consistent with the common pattern and experience of those who use alcohol to an excess.

The testimony of all the witnesses who testified regarding the decedent's mental condition and drinking habits has been carefully considered and reviewed - regardless of the apparent interest or lack of interest - - of any witness. However, there is clear and convincing evidence by truly disinterested witnesses who were living in the same vicinity as the decedent at the time this will was made, which supports the conclusion that Mr. Chahsenah was mentally competent to make a will in

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March, 1963, if he was sober. The testimony of other witnesses to the contrary is not sufficient to be convincing to the undersigned, particularly, when coupled with the terms of the instrument itself and general practice of the Field Solicitor's Office at Anadarko, which is followed with regards to testamentary instruments.

This will is not unnatural in that it fails to provide for the decedent's daughter, Dorita High. There is no evidence that he had any close paternal ties to this girl during the later part of his life. After the death of his mother in 1954, his closest relatives, besides his daughter, were nieces and nephews, and the testimony speaks for itself in establishing that relationships with these nieces and nephews was often "strained". On November 27, 1956, he executed a will naming his niece, Viola Atewoofatakewa as the sole beneficiary, and stated that Viola had been raised in his mother's home. Subsequently, he made four more wills including the March 14, 1963 instrument. In addition to the testimony, all five of these instruments have been reviewed in the light of the other evidence. It is hereby found that this last will is natural and logical in the light of all the evidence.

It is hereby found that this will was made in accordance with the facts and circumstances expressed in the testimony of the attesting witnesses, and no clear and convincing evidence has been presented which would justify denying Departmental approval.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by Section 1 of the Act of June 25, 1910 (36 Stat.

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855), and other applicable statutes, and pursuant to 25 CFR 15, I hereby approve the decedent's last will and testament, dated March 14, 1963.

IT IS ORDERED, that the Superintendent will cause to be made a distribution of the trust or restricted estate of the decedent in accordance with his last will and testament, subject to payment of the probate fee and allowed claims, as follows:

To Viola Atewooftakewa, niece, and Frankie Lee Tooahnippah, grand-nephew, Comanche Unallottees and devisees, an undivided one-half interest in the following:

An undivided  $1/4$  interest in the allotment of Wah-ah-rock-ah, Comanche #2326, described as the SW/4 of Section 3-2N-8W, I.M., in Okla., containing 160 acres.

To Vila Tooahnippah and Julia Tooahnippah, grand-nieces, Comanche Unallottees and devisees, an undivided one-half interest in the following:

All that part of the allotment of Sarah Chahsenah, Comanche #2778, described as the SW/4 SW/4 of Sec. 4-4N-10W, I.M., in Oklahoma, containing 40 acres.

An undivided  $1/5$  interest in the allotment of Sarah Chahsenah, Comanche #2778, described as the SE/4 SW/4 of Sec. 4-4N-10W, I.M., in Oklahoma, containing 40 acres.

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To Viola Atewooftakewa, niece, Frankie Lee Tooahnippah, grand-nephew, Vila Tooahnippah and Julia Tooahnippah, grand-nieces, Comanche Unallottees and devisees, an undivided 1/4 interest in the following:

Any and all other trust property, real, personal or mixed, not otherwise disposed of under the terms of the will, if any there be.

The following claims are hereby allowed and are to be paid in the order listed below from funds now held or hereafter accruing to the credit of the estate, subject to payment of the probate fee:

1. Crews Funeral Home, Apache, Oklahoma, in the amount of \$843.00, covering decedent's funeral expenses.

(The following claims have equal priority of payment).

2. James W. Aust Finance & Loan Co., 510 D. Ave., Lawton, Oklahoma, in the amount of \$332.79, covering loans made to the decedent from November 1960 through February 1961.

C. H. Christian, Route 3, Apache, Oklahoma, in the amount of \$56.85, covering money loaned to the decedent.

Schartzer's Food Market, Apache, Oklahoma, in the amount of \$124.60, covering groceries purchased by the decedent.

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Elliott Department Store, P.O. Box 352, Apache, Oklahoma, in the amount of \$10.15, covering purchases made by the decedent.

D. V. Warner, Apache, Oklahoma, in the amount of \$1,000.00, covering money loaned to the decedent on July 1, 1961, for the purpose of providing legal services to Strudwick Tahsequah represented by a promissory note signed by this decedent. The balance of the claim of D. V. Warner in the amount of \$2,353.77, also represented by a promissory note, dated July 1, 1961, is hereby disallowed. This latter instrument purportedly relates to some vague gift transaction between the claimant and the decedent which was never completed during the decedent's life. The undersigned is not prepared to obligate the payment of trust or restricted funds to complete this transaction where any contractual rights are extremely dubious due to lack of adequate consideration.

The trust or restricted estate of the decedent having been appraised at \$34,867.00, a probate fee of \$75.00 will be collected by the Superintendent or other officer in charge pursuant to authority found in the Act of January 24, 1923 (42 Stat. 1185).

Done at the City of Tulsa, Oklahoma, and dated August 31, 1966.

(Sgd.) Kent R. Blaine  
\_\_\_\_\_  
Kent R. Blaine  
Examiner of Inheritance

Appendix x

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
Office of the Solicitor  
Office of the Examiner of Inheritance  
712 Petroleum Building  
Tulsa, Oklahoma 74103

PROBATE  
H-173-66  
H-220-66  
KRB

IN THE MATTER OF THE	)	
ESTATE OF:	)	
George Chahsenah,	)	PETITION FOR
deceased Comanche	)	REHEARING DENIED
Unallottee	)	

The above-named decedent's last will and testament was approved by the undersigned on August 31, 1966, Probate #H-173-66. On October 31, 1966, Dorita High Horse, Zelma Tselee, John H. Chahsenah, Garnett Tahsequaw, Betsy Lois Chahsenah (Tarsip), Earl Chahsenah, Strudwick Tahsequaw, Lydia Mae Tarsip, James Chahsenah and Albert Tahsequaw, Jr., filed a petition for rehearing under the provisions of 25 CFR 15.17.

The petitioners assert that the last will and testament dated March 14, 1963, was not a proper testamentary instrument, and the order approving it was in error as a matter of fact and as a matter of law. No specific errors of law are set forth; the petitioners' position, simply stated, is that the evidence does not support the factual conclusions reached by the undersigned regarding the testator's mental capacity at the time the will was made and executed.

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The extensive evidence presented in this case was carefully considered prior to the initial ruling. It has again been reviewed in the light of the arguments set forth in the petition for rehearing. These arguments presented by the petitioners are not convincing, and the conclusions of law and facts set forth in the order dated August 31, 1966, remain unchanged.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by Section 1 of the Act of June 25, 1910 (36 Stat. 855), and other applicable statutes, and pursuant to 25 CFR 15, for the foregoing reason, the above-mentioned petition for rehearing is hereby denied.

This action on the petition for rehearing becomes final sixty (60) days from the date hereof. The petitioners may within this 60 day period (or within such additional period as the Secretary, for good cause may allow) file with the Superintendent, Anadarko Agency, Bureau of Indian Affairs, Anadarko, Oklahoma, a written notice of appeal to the Secretary of the Interior. Such notice of appeal shall state specifically and concisely the reasons for the appeal. Copies of the notice of appeal shall be furnished by the appellants to the Examiner of Inheritance and to all parties who share in the estate under the decision of the Examiner, and the notice of appeal shall contain a certification stating that this has been done. In addition, the appellants and any other interested party may, within 60 days from the date on which the notice of appeal is filed, submit written arguments to the Tulsa Regional Solicitor, U. S.

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Department of the Interior, 712 Petroleum  
Building, Tulsa, Oklahoma.

Done at the City of Tulsa, Oklahoma, and  
dated November 16, 1966.

(Sgd.) Kent R. Blaine

Kent R. Blaine

Examiner of Inheritance

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UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
TULSA REGION  
P. O. Box 3156  
Tulsa, Oklahoma 74101

IA-T-4

June 20, 1967

Estate of George	:	Probate H-173-66 and
Chahsenah, deceased	:	H-220-66
Comanche unallottee	:	Order approving will reversed

APPEAL FROM A DECISION OF A HEARING EXAMINER

Dorita High Horse and certain nieces and nephews of the decedent, George Chahsenah, appeal through counsel from an order of the Hearing Examiner, Tulsa, dated August 31, 1966, approving a will of the decedent, and from an order dated November 16, 1966, denying their petition for a rehearing.

The decedent died on October 11, 1963, at the age of 55 years, a resident of the State of Oklahoma, having never married and leaving no surviving parent, brother, or sister. He was survived by several nieces and nephews, most of whom are appellants herein, and by his daughter, Dorita High Horse, appellant herein, the paternity of whom the decedent had acknowledged on several occasions. The evidence supporting the Examiner's finding of fact that Dorita High Horse is decedent's daughter is virtually uncontradicted in the record

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and is so convincing that this finding would be sustained on appeal if it had been contested, which it was not.

The record discloses that the decedent executed at least six wills dated successively November 27, 1956, in favor of a niece, Viola Atewoofakewa; March 19, 1957, in favor of a friend, Sammy Schwartzer; May 21, 1959, in favor of a friend, Fred H. Benge; October 20, 1959, in favor of a nephew Strudwick Tahsequah; March 6, 1962, in favor of a cousin, Rosa May Wahahrockah; and March 14, 1963, in favor of a niece, Viola Atewoofakewa, and her three children, Frankie Lee Tooahnippah, Vila Tooahnippah and Julia Tooahnippah. None of these wills contains a reference to the daughter of the decedent, although the earliest purported will states that decedent had no children.

The record supports the Examiner's conclusion that, although the decedent's excessive drinking may have grown progressively worse during the last few years of his life, testimony to the effect that the decedent was "never sober" for a period of several years must be rejected as impossible to accept at face value. The record further supports the Examiner's conclusion that the decedent was not in an intoxicated condition at the time he executed the latest purported will dated March 14, 1963. It also supports strongly his further conclusion that when the decedent "'needed' or really wanted something to drink, he would promise, threaten, beg, or do whatever was necessary in an attempt to get alcohol."

The record contains no indication that the decedent ever made any personal effort to work or

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earn any wages during his lifetime, but reflects that his principal income was the money he received, usually at monthly intervals, from the leasing of his restricted lands for oil, gas and agricultural purposes. These funds were usually spent within a few hours or days after he received them for intoxicants and for personal items, such as food-stuffs, which could, and often would, be subsequently traded for intoxicants during periods of temporary financial adversity. In order to purchase intoxicants during such periods, he often obtained advances of money from relatives or other associates, several of whom were named as devisees in his various purported wills, and repaid such loans when funds were subsequently received.

The Examiner concluded that the will dated March 14, 1963, met the technical requirements for a valid will and was not unnatural in failing to provide for the decedent's daughter as there was no evidence that the decedent had any close paternal ties to the daughter during the later part of his life. He thereupon approved the latest purported will of the decedent by an order dated August 31, 1966, apparently without considering whether the circumstances were such as to justify such approval as an exercise of the discretionary authority conferred upon the Secretary by 25 U.S.C. §373. The Secretary's responsibility is not adequately discharged when he, or an examiner acting for him, determines that a purported will meets the technical requirements for a valid dispositive instrument and thereupon, without further consideration, approves the will as a matter of course. When a purported will is submitted for approval and it has been determined that it meets the technical requirements for a valid will, further consideration must be given before

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approving or disapproving it to determine whether approval will most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law. 1/

Since the record contains sufficient evidence of the relationship between the decedent and his heir-at-law and his devisees to ascertain whether approval of the will by the Hearing Examiner was an appropriate discharge of the Secretary's responsibility, consideration of the circumstances surrounding these persons will be given at this appellate level.

The decedent was the natural father of Dorita High Horse. The record reflects that during his lifetime the decedent's only contribution toward the welfare of his daughter was to participate in her conception, to acknowledge her status as his daughter, and to visit briefly with her on rare occasions when they would by accident meet on public streets. Before the daughter's birth, he abandoned the mother, with whom he had been living. Although marriage to the mother was not impeded by any existing or subsequent marriage to another woman, the decedent neglected to remain and maintain a home with the mother in order that the daughter would have the advantages of a normal home life during her childhood. Notwithstanding

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1/ Estate of Oliver Maynahonah, IA-T-1 (June 30, 1966), affirmed as Kadayso v. Udall, Civil Action 66-281, U.S. District Court, Western District of Oklahoma (February 14, 1967); Estate of Kosope (Richard) Maynahonah, IA-141 (October 28, 1954); and Estate of Frank (Oren F.) Simpkins, Osage Allottee No. 1879 (will disapproved December 1, 1943, application for reconsideration denied February 23, 1945).

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the fact that the decedent received income from his restricted lands, he made no contribution toward the support or education of his daughter, leaving her to be supported by her mother, until she died when the daughter was six years old, and thereafter by a maternal aunt. The decedent's legal responsibility for the support of his daughter during her childhood could have been enforced by judicial action on her behalf to the extent, if any, that he had unrestricted income or assets, and the Secretary or his authorized representative probably would have honored reasonable requests on the daughter's behalf for contributions toward her support from the decedent's income from restricted lands. However, no action toward that end was taken by the decedent, by his daughter, or by others on her behalf.

If the decedent had died several years earlier leaving an orphaned minor daughter being raised by an aunt, any will disinheriting the daughter would be subject to disapproval because the estate would be needed for discharging his responsibility for supporting the child. The fact that the daughter had attained majority and married prior to the death of the decedent does not alter the fact that the decedent had an obligation to his daughter which was not discharged either during his lifetime or under the terms of his purported will. For this reason it is inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare by lending his approval to the decedent's will.

This decedent failed to make any appreciable effort toward discharging his responsibilities to his daughter during her childhood, and upon her attaining adulthood he attempted by will to devise

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and bequeath to others such of his restricted assets as had not been dissipated. This he could do only if he possessed unrestricted power of testamentary disposition. His attempt to do so, however, was limited by the fact that the Secretary must exercise the discretionary responsibility of approving the will before it can become effective. Although the Examiner approved the will, this appeal from that approval requires the appellate authority to determine whether such approval was a reasonable exercise of the discretionary responsibility of the Secretary.

I hereby determine, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2a(3)(a), 24 F.R. 1348) and redelegated to the Regional Solicitor (Solicitor's Regulation 23, 31 F.R. 4631), that under the circumstances hereinbefore set forth the Secretary's approval of the purported will dated March 14, 1963, should not be given, the Examiner's approval is rescinded, and the will is hereby disapproved.

Each of the decedent's previous wills would receive similar disposition if offered for approval because each of them disinherits the decedent's daughter. It follows that no useful purpose would be served by additional hearings, for which reason the Examiner's denial of a petition for rehearing is not reversed. Accordingly, the entire estate of the decedent remaining after payment of allowed claims shall be distributed, without further order of the Examiner, to Dorita High Horse as the sole heir of the decedent.

(Sgd.) Raymond F. Sanford  
Raymond F. Sanford  
Regional Solicitor

Appendix xix

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

VIOLA ATEWOOF TAKEWA (Tate)	)	
FRANKIE LEE TOOAHNIPPAH	)	
VILA TOOAHNIPPAH, and	)	
JULIA TOOAHNIPPAH (Goombi)	)	
Plaintiffs	)	
-vs-	)	CIVIL NO.
	)	67-323
STEWART L. UDALL, Secretary	)	
of the Interior for the	)	
UNITED STATES OF AMERICA	)	
Defendant	)	
DORITA HIGH HORSE	)	
Intervenor	)	

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Omer Luellen, Hinton, Oklahoma, for Plaintiff

Robert L. Berry, Assistant United States  
Attorney, Oklahoma City, Oklahoma, for  
Defendant

Houston Bus Hill, Oklahoma City, Oklahoma,  
for Intervenor

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MEMORANDUM OPINION

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Before LUTHER B. EUBANKS, United States District  
Judge

## Appendix xx

The plaintiff's are Comanche Indians who were named as beneficiaries under their deceased Comanche uncle's last will and testament which the Secretary of the Interior has declined to approve, and seek by this action to set aside the administrative decision which denied approval of the will, alleging it to be arbitrary, capricious, in excess of authority, without reasonable basis, and that it amounts to an abuse of discretion. 1/ The sole

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1. Plaintiffs have attempted to invoke jurisdiction under the Administrative Procedure Act, 5 U.S.C. §701 et seq. The decisions do not appear to be entirely in harmony as to the scope of the jurisdiction conferred by the Administrative Procedure Act to grant review of administrative decisions in actions brought against the Secretary of the Interior for that purpose. There can be no doubt but that this court has jurisdiction under 28 U.S.C. §1361, and upon that basis jurisdiction is taken here, as it has been by this court upon other occasions, in order to effectuate the purposes of the Administrative Procedure Act by providing the review function which the act contemplates. Moreover, this court has heretofore considered and resolved to its satisfaction that there is no express limitation contained in the language of §2 of the Indian Probate Act, infra, which precludes judicial review of Indian will approval decisions. Unlike §1 of the act, which relates to the determination of the heirs of Indians who die without having made a will, §2 contains no language by which will approval decisions of the Secretary are made final and conclusive. See *Homovich v. Chapman*, 191 F.2d 761 (D. C. Cir. 1951); *Attocknie v. Udall*, 261 F. Supp. 876 (W.D. Okla. 1966).

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basis for denying approval is that the will failed to make provision for the intervenor, who was determined by the Secretary to be the decedent's daughter born out of wedlock, and as such to be entitled to inherit the entire estate as decedent's sole heir, in the absence of an approved will, by virtue of the provisions of 25 U.S.C. §371.

Congress has granted to Indians the right to make wills, subject only to the approval of the Secretary of the Interior. 2 Such approval is

2. The authority of the Secretary of the Interior to approve wills of Indians owning allotted lands is contained in § 2 of the Act of June 25, 1910, 36 Stat. 856, as amended by the Act of February 14, 1913, 37 Stat. 678, 25 U.S.C. § 373, which provides, in its essential details, that any Indians, except members of the Five Civilized Tribes or of the Osage Tribe, over the age of twenty-one years having any right, title or interest in any Indian lands or moneys held in trust by the United States or restricted upon alienation shall have the right to dispose of such property by will in accordance with regulations to be prescribed by the Secretary of the Interior. It further provides that such a will shall not be valid nor have any force or effect unless it shall have been approved by the Secretary of the Interior; that the Secretary may approve or disapprove the will either before or after the death of the testator and where such a will has been approved and it is subsequently discovered that there was fraud in connection with the execution or procurement thereof, the Secretary of the Interior within one year after the death of the testator may cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the state wherein the property is located.

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requisite to validity. Lacking such approval an Indian will is totally without force and effect to dispose of the trust estate. The will which is the subject of this review has never received the required Secretarial approval and, therefore, is not a valid will; nor can it achieve the status of a valid will until such time as the approval required by the statute has been conferred. The question with which this court is concerned in the present action is whether the Secretary, in the circumstances presented, can properly withhold his approval of this will, which otherwise meets all of the requirements of a valid testamentary instrument, without such action amounting to an arbitrary denial of the decedent's statutory right to predetermine those persons to whom his trust estate shall devolve.

The will which is the subject of the administrative decision under review in this action was made by George Chahsenah, an unallotted Comanche Indian, approximately seven months prior to his death. He died without having ever been married, and without leaving a surviving father, mother, brother or sister. He was the owner by inheritance of certain Indian property allotted in accordance with the provisions of the General Allotment Act of February 8, 1887 <sup>3/</sup> which, under the provisions of his will, was devised to a niece and her children with whom, the record indicates, he resided for a considerable portion of the later years of his life. The hearing examiner found no lack of testamentary capacity, and that the will was not the product of

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3. 24 Stat. 388. The act provides, inter alia, that the United States shall hold the lands in trust for the allottee during the existence of the trust period or any extension thereof, or, in case of his decease, for his heirs.

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fraud, duress, coercion, or undue influence. <sup>4/</sup>  
In accordance with the applicable regulations <sup>5/</sup>  
the examiner entered an order which approved the  
will and decreed distribution of the estate in  
accordance with its provisions. A petition for re-  
hearing was subsequently filed and denied by the  
examiner.

The hearing examiner found the decedent to  
have been survived by an adult daughter, Dorita

- 
4. The administrative record discloses that  
the examiner held four separate formal hear-  
ings upon the decedent's will prior to  
the entry of his order of approval. The purpose  
of those hearings was to ascertain whether  
or not the will was entitled to receive the  
approval required by § 2 of the Indian  
Probate Act, supra. The examiner's  
authority to grant such approval is derived  
from a delegation of the Secretary's  
authority set out in the appropriate depart-  
mental regulations. The examiner found the  
will to be entitled to approval and he  
approved it.
  5. The applicable regulations of the Secretary  
of the Interior are set out in Part 15 of  
25 C.F.R. (1966 ed.).

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High Horse, born out of wedlock, 6/ and that her mother and the decedent had cohabitated together in the custom and manner of Indian life sufficiently to entitle the daughter to inherit from the decedent under 25 U.S.C. §371. The effect of those findings is to make Dorita High Horse the decedent's sole heir at law, and thus entitled to inherit the decedent's entire estate in the absence of an approved will.

- 
6. This court has not found the evidence of the decedent's paternity nearly as convincing as did the hearing examiner and the Regional Solicitor. The evidence in that regard which is contained in the administrative record is conflicting and, in my view, could have supported a finding to the contrary. I am intrigued by the singular fact that the mother of this putative daughter, Mary High, must have suffered from an equal lack of conviction of the decedent's paternity, as evidenced by her actions at the time of Dorita High Horse's birth. She attributed paternity to a different individual, and that individual is named as the father in the birth certificate which was prepared at the time. The only telling evidence in support of the finding is a skillfully typewritten letter, dated August 31, 1949, and obviously not prepared by the decedent, which is addressed to the Oklahoma Bureau of Vital Statistics and which is purported to be signed by the decedent, wherein it is stated that Dorita High is his daughter and that he was "perfectly willing for her to use his name as her name on her birth certificate or in school." The record would seem to indicate that, until she acquired the surname "Horse" as a result of her present marriage, she went by the surname of her mother.

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The evidence in the administrative record indicates that the decedent and Dorita High Horse never maintained the usual father-daughter relationship. Their relationship can best be described as being that of casual acquaintances. The Regional Solicitor, in his administrative decision which rescinded the examiner's approval of the decedent's will, noted that fact. He stated: ". . . The record reflects that during his lifetime the decedent's only contribution toward the welfare of his daughter was to participate in her conception, to acknowledge her status as his daughter, and to visit briefly with her on rare occasions when they would by accident meet on public streets . . ."

Having been denied their petition for rehearing, the plaintiffs appealed to the Secretary of the Interior. Pursuant to authority delegated to the Solicitor of the Department of the Interior and redelegated to the Regional Solicitor, the latter reviewed the record and thereupon issued his decision which reversed the hearing examiner's order and withdrew the approval of the will which had been granted by the examiner. The Regional Solicitor's action constituted a final administrative decision which exhausted the administrative remedy and led to the filing of this action for review.

The Regional Solicitor, in support of his conclusion that approval was to be denied, stated in his decision that "When a purported will is submitted for approval and it has been determined that it meets the technical requirements for a valid will, further consideration must be given before approving or disapproving it to determine whether approval will most nearly achieve just and

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equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law."

The import of the Regional Solicitor's views is that an inequity will result should the decedent's estate be permitted to devolve upon a niece, who had provided the decedent with a home, and to her children, and thereby is denied to a putative daughter whose relationship with the decedent was only of the most casual nature. I find difficulty in following his reasoning to that conclusion. Moreover, there is danger in that course in that it provides no recognizable standard, thereby permitting the Secretary to go as near or as far in the grant of his sanction as his sympathies may lead him, in whatever direction, and conceivably could result in all manner of discretionary abuses.

Wills are a common feature of modern life. They are customarily made with only one purpose in view, that purpose being to alter the usual order of descent and distribution. Otherwise the act of making a will would be meaningless. The concept of the will making process is that the maker is provided with a method by which he can predetermine the persons to whom his estate shall devolve. It is not infrequent that those heirs who are not included in the will maker's bounty should appear to be victims of inequitable treatment. Equity plays no part in the will making process, as any heir who has been cut off without a dollar will vouchsafe. A will is the testator's last available means of rewarding those who have befriended him during his lifetime and for evening the score with those who have not. It must be assumed that the will maker has his reasons, and that they are valid.

## Appendix xxvii

Congress has conferred the will making right upon all adult Indians. The only limitation upon that right is that the will must be approved by the Secretary of the Interior. It is incumbent upon the Secretary that he not lose sight of the fact that the will making right has been conferred upon the Indian and not upon the Secretary. Surely there must be a point beyond which the Secretary cannot go in withholding his approval before his act of disapproval is to amount to an arbitrary denial of the statutory will making right.

Where disapproval is founded upon some rational basis, denial of approval of an Indian will cannot be said to be an abuse of discretion. 1 Examples of what may constitute reasonable bases upon which approval may be denied are lack of testamentary capacity, fraud, duress, coercion, undue influence, overreaching, substantially changed conditions as to the decedent's heirs or estate occurring subsequent to the making of the will, and improvident disposition.

- 
7. It is a well-established proposition that administrative action must have a "reasonable" or "rational" basis if it is to avoid the stigma of arbitrariness. *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575, 91 L.Ed. 1995 (1947); *Unemployment Compensation Commission of Territory of Alaska v. Aragan*, 329 U. S. 143, 67 S. Ct. 245, 91 L. Ed. 136 (1946); *Dell Publishing Co. v. Summerfield*, 198 F. Supp. 843 (D.D.C. 1961), aff'd, 303 F. 2d 766 (D.C. Cir. 1962); *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 54 S. Ct. 692, 78 L. Ed. 1260 (1934); *Eastern Central Motor Carriers Ass'n. v. United States*, 239 F. Supp. 243 (D.D.C. 1965)

#### Appendix xxviii

In the decision now under review, the will was denied approval because the decedent had failed to make provision for a daughter born out of wedlock. In *Attocknie v. Udall*, 261 F. Supp. 876 (W.D. Okla. 1966), this court upheld a decision of the Secretary which granted approval to an Indian will in exactly opposite circumstances from those presented here. In that case approval was granted to a will wherein no provision was made for a son born out of wedlock. I am unable to perceive the distinction wherein that will was considered to be susceptible of approval but the will which is the subject of this review was not considered to be susceptible of being accorded the same treatment.

This decedent's will was not an unnatural one in light of the circumstances. Someone has lost sight of the fact here that Congress has conferred the right to make a will upon the Indian and not upon the Secretary. The Secretary can no more use his approval powers to substitute his will for that of the Indian than he can dictate its terms. If the will making right is to be meaningful the Indian must be given a free hand to decide upon those persons who shall be the objects of his bounty without unreasonable Secretarial interference. I find that the denial of approval of the last will and testament of George Chahsenah lacks a rational basis and is an unreasonable and arbitrary denial of a right conferred upon him by Congress.

The motion of the plaintiff is granted, the motions of the defendant and the intervenor are denied, and the will is remanded to the Secretary of the Interior with directions to approve it and distribute the decedent's estate in accordance with its provisions.

Counsel for plaintiff will prepare formal judgment in accordance herewith.

Appendix xxix

The Clerk will mail a copy hereof to all counsel of record.

Dated this 18th day of December, 1967.

(Sgd.) Luther B. Eubanks  
Luther B. Eubanks  
United States District Judge

Appendix xxx

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

VIOLA ATEWOOF TAKEWA (Tate)	)	
FRANKIE LEE TOOAHNIPPAH	)	
VILA TOOAHNIPPAH, and	)	
JULIA TOOAHNIPPAH (Goombi)	)	Plaintiffs
	)	
vs.	)	CIVIL NO.
	)	67-323
STEWART L. UDALL, Secretary	)	
of the Interior for the	)	
UNITED STATES OF AMERICA	)	Defendant
	)	
DORITA HIGH HORSE	)	Intervener

ORDER AND JUDGMENT

This cause came on to be heard on the Motion of the Defendant, Stewart L. Udall, Secretary of the Interior for the United States of America for Summary Judgment and on the Motion of the Intervener, Dorita High Horse for Summary Judgment, and on the Cross-Motion of the Plaintiffs, Viola Atewoof takewa (Tate), Frankie Lee Tooahnippah, Vila Tooahnippah, and Julia Tooahnippah (Goombi) for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the administrative record of the testimony, pleadings, and files on file herein relative to the probate of the Will of George Chahsenah, deceased Comanche Unallottee, and all of the parties herein having furnished their written Briefs to the Court upon the issues herein, and the Court having determined that this Court has jurisdiction of the said Action, and the Court

Appendix xxxi

having found that the denial of the approval of the last Will and Testament of George Chahsenah, deceased, dated March 14, 1963, by the Secretary of the Interior lacks a rational basis and is an unreasonable and arbitrary denial of the right of George Chahsenah to make his last Will and Testament as conferred upon him by Congress, and due deliberation having been had thereon, and the decision of this Court having been filed herein, it is

ORDERED that the Defendant's Motion for Summary Judgment be and the same hereby is denied, and it is further

ORDERED that the Intervener's Motion for Summary Judgment be and the same hereby is denied, and it is further

ORDERED that the Plaintiff's Cross-Motion for Summary Judgment be and the same is hereby granted, and it is further

ORDERED, ADJUDGED AND DECREED that the last Will and Testament dated March 14, 1963, of George Chahsenah, deceased Comanche Unallottee, is remanded to the Secretary of the Interior for the United States, and it is further

ORDERED, ADJUDGED AND DECREED that the Secretary of the Interior approve the last Will and Testament of George Chahsenah, deceased, and distribute his Estate in accordance with the provisions of the decedents last Will and Testament.

Dated this 28 day of December, 1967.

(Sgd.) Luther B. Eubanks

Luther B. Eubanks

United States District Judge

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

APPEALS FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Appendix xxxiii

Houston Bus hill, Oklahoma City, Oklahoma, for Appellant, Dorita High Horse;

Clyde O. Martz, Assistant Attorney General, Washington, D. C. (B. Andrew Potter, United States Attorney, Oklahoma City, Oklahoma, Robert L. Berry, Assistant United States Attorney, Oklahoma City, Oklahoma, S. Billingsley Hill and John G. Gill, Jr., Attorneys, Department of Justice, Washington, D. C. on the brief) for Appellant, Stewart L. Udall, Secretary of the Interior.

Omer Luellen, Hinton, Oklahoma, for Appellees.

Before MURRAH, Chief Judge, and PHILLIPS and HILL, United States Circuit Judge.

PER CURIAM.

This litigation originated with the filing of a complaint in the United States District Court for the Western District of Oklahoma by the appellees in the two consolidated appeals before us. The action sought judicial review of the orders of the Secretary of the Interior and his subordinates. Jurisdiction was invoked under the Administrative Procedure Act and 28 U.S.C. § 1391. The trial court took jurisdiction under § 1391, sustained a Motion for Summary Judgment filed by the plaintiffs, appellees here, and reversed the order of the Secretary and his subordinates.

The basic facts are without dispute. One George Chahsenah, a Comanche Indian, died, leaving a will dated March 4, 1963, and by this instrument left all of his estate consisting of Indian Trust

#### Appendix xxxiv

property to his niece and her three children, who are the appellees in both appeals. <sup>1/</sup> Pursuant to 25 U.S.C. § § 372 and 373, after hearings, a Department of Interior Examiner of Inheritance approved the will and ordered distribution of the estate accordingly. Appellant, Dorita High Horse, the natural daughter of the testator, contested the will before the Examiner and appealed the decision to the Secretary of the Interior.

The Secretary reviewed the record, approved the findings of fact made by the Examiner, including a finding that Dorita was the natural daughter and only heir-at-law of the decedent, and ruled that it was "inappropriate" to perpetuate this utter disregard for the daughter's welfare by lending his approval to decedent's will." He disapproved the will and ordered distribution to Dorita High Horse, as the sole heir of decedent. The filing of this action followed and Dorita intervened to assert her rights under the decision of the Secretary.

At the outset we are confronted with the question of jurisdiction, which was raised in the trial court and argued here by appellees. A lengthy discussion of the question is not necessary because

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1/

The record shows that the decedent had executed five prior wills. The first in 1956 left his property to a niece; the second in 1957 left his property to a friend; the third in 1959 left his property to a different friend; the fourth in favor of a nephew; and the fifth devised his estate to a cousin. None of his wills contained any reference to appellee Dorita High Horse, his daughter.

Appendix xxxv

this court, in two recent decisions, has denied jurisdiction of the courts to review orders of the Secretary concerning either intestate succession of restricted Indian property or the approving or disapproving of wills affecting restricted Indian property. In a well reasoned opinion in *Heffelman v. Udall*, 378 F.2d 109 (1967), Judge Lewis held that sections 1 and 2 of 25 U.S.C. § 372 precluded judicial review of such orders in any action brought under 28 U.S. C. § 1331, § 1361, § 1391 or § 2201. In *Attocknie v. Udall*, 390 F. 2d 636 (1968), cert. den. October 14, 1968, this court reaffirmed the teachings of *Heffelman*, and we certainly are not disposed to disturb the law of those cases.

For the reasons stated in *Heffelman v. Udall*, *supra*, and *Attocknie v. Udall*, *supra*, the judgment of the trial court is Vacated and the case is Remanded with directions to dismiss the action for want of jurisdiction.

filed  
United States Court of Appeals  
Tenth Circuit

MAR 3 1969

William L. Whittaker  
Clerk

Appendix xxxvi

Before Honorable Alfred P. Murrah, Chief  
Judge, and Honorable Orie L. Phillips and  
Honorable Delmas C. Hill, Circuit Judges.

Dorita High Horse, et al.,	)	
	)	
Appellants,	)	
	)	
vs.	)	9979-9980
	)	
James Tooahimpah Tate	)	
et al.,	)	
Appellees.	)	

These causes came on to be heard on the  
motion of appellees for a rehearing herein and were  
submitted to the court.

On consideration whereof, it is ordered  
that the said petition be and the same is here-  
by denied.

Before William L. Whittaker, Clerk.

April 8, 1969

## Appendix xxxvii

The Code of Federal Regulations that are still in full force and effect and were in full force and effect when the Will of George Chahsenah, the decedent herein, was executed and when same was offered for probate and approval can be found in Title 25 of the Code of Federal Regulations, Subchapter C-Probate Part 15 and all Sections of Part 15 that pertain to the execution of Wills and the approval of said Wills of Indian testators are as follows:

"§ 15.28 'Making, approval as to form, and revocation of wills.' (a) An Indian of the age of 21 years and of testamentary capacity, who has any right, title, or interest in trust or restricted property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses.

(b) Where a will has been executed and filed with the superintendent during the lifetime of the testator, the will shall be forwarded by the superintendent to the examiner of inheritance, who shall pass on the form of the will and then return it to the superintendent with appropriate instructions. A will shall be held in absolute confidence, and its contents shall not be divulged prior to the death of the testator.

(c) The testator may, at any time during his lifetime, revoke his will by a subsequent will or other writing executed with the same formalities as are required in the case of the execution of a will, or by physically destroying the will with the intention of revoking it. No will that is subject to the regulations of this part shall be deemed to be revoked by operation of the law of any State.

## Appendix xxxviii

§ 15.1 'Administration of estates.' The heirs of Indians who die intestate possessed of trust or restricted property shall be determined by examiners of inheritance except as otherwise provided in the regulations in this part. The wills of deceased Indians disposing of trust or restricted property shall be approved or disapproved by examiners of inheritance except as otherwise provided in the regulations in this part. Claims against the estates of Indians shall be allowed or disallowed by examiners of inheritance in accordance with the regulations in this part.

§ 15.12 'Wills, validity attested.' No action shall be taken on the will of a deceased Indian until testimony shall have been taken as to the testamentary capacity of the decedent to execute the will and as to the circumstances surrounding its execution. A reasonable effort shall be made to procure the testimony of the attesting witnesses to the will; or, if their testimony is not reasonably available, an effort shall be made to identify their signatures through other evidence.

§ 15.15 'Decision.' The Examiner of Inheritance shall, except as provided in § 15.21, decide the issues of fact and law involved in the proceeding and shall incorporate his findings and conclusions in a decision. Every decision determining the heirs of an Indian who died intestate shall cite the law of descent and distribution in accordance with which the decision was made. Every decision approving the will of an Indian shall state the devisees and

## Appendix xxxix

legatees who take under the will and the particular property which each is to receive, and shall construe any ambiguous provision of the will. Every decision shall state those claims against the estate which are allowed and those claims which are disallowed. A copy of the decision shall be mailed to each person who is found by the Examiner to be entitled to share in the estate, to each person whose claim to share in the estate was considered and denied by the Examiner, and to the Superintendent."

# **In the Supreme Court of the United States**

OCTOBER TERM, 1969

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No. 300

**JAMES TOOAHIMPAH TATE, ET AL., PETITIONERS**

**v.**

**WALTER J. HICKEL, SECRETARY OF THE INTERIOR,  
AND DORITA HIGH HORSE**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

---

## **BRIEF FOR THE SECRETARY IN OPPOSITION**

### **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. xxxii-xxxv) is reported at 407 F. 2d 394. The opinion of the district court (Pet. App. xix-xxix) is reported at 277 F. Supp. 464. The administrative decision, which became the Secretary of the Interior's final order (Pet. App. xiii-xviii), is not reported.

### **JURISDICTION**

The judgment of the court of appeals was filed on March 3, 1969, and a petition for rehearing was denied on April 8, 1969. The petition for a writ of certiorari was filed on June 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

## QUESTION PRESENTED

Whether the Secretary of the Interior's disapproval of the will of an Indian as specifically authorized by statute may be overturned by a court.

## STATUTE INVOLVED

The Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. 373, provides:

Sec. 2. Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: \* \* \*.

## STATEMENT

George Chahsenah, a Comanche Indian, died leaving a restricted estate consisting of interests in three Comanche allotments (Pet. App. iii). Under a will dated March 14, 1963, George Chahsenah devised and bequeathed his estate to a niece and her three children, petitioners herein (Pet. App. xiv.) The will made no mention of the decedent's daughter, Dorita High Horse (Pet. App. xiv).

Dorita High Horse and others contested the testamentary capacity of the decedent because of his history of prolonged excessive drinking (Pet. App. iii-iv, xiv). After hearing conflicting evidence, the Bureau of Indian Affairs' hearing examiner approved the will, finding that the decedent was mentally competent when the will was made (Pet. App. v-vi). The examiner also found that Dorita High Horse was the illegitimate daughter of the decedent (Pet. App. ii-iii). In departmental proceedings, that approval was rescinded and the will disapproved (Pet. App. xviii). The Regional Solicitor, acting for the Secretary, found that the decedent had failed to discharge his responsibilities to his daughter during her childhood and that it would be "inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare by lending his approval to the decedent's will" (Pet. App. xvii). Petitioners then commenced this action, seeking to have the Secretary's decision set aside and the estate distributed in accordance with the terms of the will (Pet. App. xx). The judgment of the district court, ordering the Secretary to ap-

prove the will (Pet. App. xxx-xxxi), was reversed by the court of appeals, with directions to dismiss for lack of jurisdiction on the ground that, under Section 2 of the 1910 Act, *supra*, the departmental decision was not subject to judicial re-examination (Pet. App. xxxii-xxxv).

#### ARGUMENT

The decision below rests upon the explicit statutory authority and responsibility of the Secretary of the Interior to supervise the distribution of Indian estates pursuant to 25 U.S.C. 372-373. The court of appeals held that the Secretary's disapproval of the Indian will involved here may not be overturned by the courts. While the opinion reaffirms that court's previous holdings of nonreviewability in broad terms, the application of the principle in this case does not, as petitioners claim, conflict with decisions of the court of appeals for the District of Columbia Circuit. While, in *Homovich v. Chapman*, 191 F. 2d 761 (C.A. D.C.), that court expressed the view that the Secretary's actions under Section 373 are judicially reviewable in some instances (and to that extent apparently disagrees with the court below), the opinion expressly holds that when the Secretary's determination is "within the scope of the authority conferred upon him, the court cannot disturb his decision." *Id.* at 764. That rule, reiterated more recently in *Hayes v. Seaton*, 270 F. 2d 319 (C.A.D.C.),<sup>1</sup> would effectively preclude review here.

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<sup>1</sup> See, also, the *per curiam* order in *Asenap v. Huff*, 312 F. 2d 358 (C.A.D.C.), directing the district court to enter summary judgment in favor of the Secretary.

We question whether the scope of judicial authority to review determinations of the Secretary of the Interior under 25 U.S.C. 373 is a matter that presses for authoritative decision by this Court. The Court recently denied review of a similar decision by the court below, sustaining as nonreviewable the Secretary's approval of an Indian will under this statute. *Attocknie v. Udall*, 393 U.S. 833. At all events, the decision below is correct under any standard of reviewability and does not warrant further review.

#### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,  
*Solicitor General.*

SHIRO KASHIWA,  
*Assistant Attorney General.*

S. BILLINGSLEY HILL,  
ROBERT S. LYNCH,  
*Attorneys.*

JULY 1969.

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In the  
SUPREME COURT OF THE UNITED STATES

---

October Term, 1969

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No. 300

---

JAMES TOOAHIMPAH TATE, et al.,  
Petitioners

v.

WALTER J. HICKEL, et al.,  
Respondents

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

---

BRIEF FOR THE PETITIONERS

---

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court for the

Western District of Oklahoma (App. 27-37)\* is reported at 277 F. Supp. 464 (1967).

The opinion of the Court of Appeals for the Tenth Circuit vacating the judgment of the Trial Court with directions to dismiss the action for want of jurisdiction is reported at 407 F.2d 394 (1969) App. 44-47).

### JURISDICTION

The judgment of the Court of Appeals was entered March 3, 1969, (App. 48-49) and on April 8, 1969, Petition of Appellees for Rehearing was denied. (App. 62).

Petition for Certiorari was filed June 28, 1969, and was granted October 13, 1969. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

### QUESTION PRESENTED FOR REVIEW

The question herein presented is:

Is a decision of the Secretary of the Interior approving or disapproving the Will of an Indian made pursuant to 25 U.S.C. § 373 subject to judicial review under the authority of 5 U.S.C. § 702 and 28 U.S.C. § 1361.

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\* A joint appendix containing the pleadings and orders of the Court has been prepared in accordance with Rule 36 for use in No. 300 and references to that appendix will be cited as App. - - -. Included as a part of this brief as appendix material are pertinent Code of Federal Regulations, Memorandum to the Secretary of the Interior and other miscellaneous documents. These will be cited, for example, as App. A at - - - or App. B at - - - etc.

STATUTES INVOLVED

Title 5 U.S.C. § 702:

Right of Review

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Title 28 U.S.C. § 1361:

Action to compel an officer of the United States to perform his duty

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Title 25 U.S.C. § 372:

Ascertainment of heirs of deceased allottees; settlement of estates; sale of lands; deposit of Indian moneys

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: \* \* \*

Title 25 U.S.C. § 373:

Disposal by will of allotments held under trust

"Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless or until it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located:  
\* \* \*".

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Explanatory Note: Emphasis in this brief will be by underscoring in lieu of italics.

Title 25 Code of Federal Regulations:

Portions of Part 15 relative to execution and approval of Wills of Indians (App. A 1-4).

STATEMENT OF THE CASE

This case originated by the filing of a Complaint (App. 5-10) by the Petitioners or their predecessors, which Complaint was filed in the United States District Court for the Western District of Oklahoma and was against Stewart L. Udall, the predecessor of the Respondent herein, Walter J. Hickel, Secretary of the Interior for the United States. Dorita High Horse was allowed to file a Plea in Intervention. (App. 11).

The Complaint of the Petitioners requested the Court to review, reverse, and set aside the decision and Order of Stewart L. Udall, Secretary of the Interior, entered on the 20th day of June, 1967, by the Secretary of the Interior, (App. 82-87) which Order by the Secretary of the Interior disapproved the Will of George Chahsenah dated March 14, 1963, and which Order stated that the Secretary of the Interior did not give his approval to the said Will and the approval of the said Will heretofore given by the Examiner of Inheritance was to be rescinded. The Petitioners further prayed in their Complaint that the Secretary of the Interior be directed to approve the probate of the Will of George Chahsenah dated March 14, 1963, (Emphasis Added) and to Decree distribution of his estate according to the terms of said Will, and that the Petitioners have all other relief proper in law and equity.

The Order of the Secretary of the Interior entered on June 20, 1967, arose in the following manner.

On March 14, 1963, George Chahsenah made a Will (App. 64-69) bequeathing and devising his estate to a niece and three (3) of her children, which niece and children were the original Petitioners in the Complaint filed in the United States District Court. George Chahsenah, a Comanche Indian, died on the 11th day of October, 1963, at the age of approximately 55 years and his death occurred approximately six (6) months after the execution of his Will dated March 14, 1963.

The factum of the Will was diligently contested before the Examiner of Inheritance by certain disinherited nieces and nephews and by Dorita High Horse, who was found by the Examiner of Inheritance to be the natural or illegitimate daughter of George Chahsenah.

The primary grounds of contest by the contestants were that George Chahsenah had not been sober enough for several years to make a Will prior to his death and that he had previously made many Wills and the contestants designated him as a "Will Maker."

The Examiner of Inheritance found that under the circumstances, the Will was not unnatural because the niece he named in his Will had been raised by the mother of the decedent in the same home as the decedent. The Examiner of Inheritance further found that the decedent was sober when his last Will was executed and the factum of the Will by the decedent met all technical requirements. He further found

that George Chahsenah was the natural father of Dorita High Horse and she was his sole heir at law. Based on the findings aforesated, the Examiner of Inheritance approved the Will of George Chahsenah and directed the distribution of his estate in accordance with said Will.

A Petition for Rehearing by the contestants was denied on November 16, 1966, by the Examiner of Inheritance. (App. 79-81).

Dorita High Horse and certain disinherited nieces and nephews of the decedent, George Chahsenah, perfected an appeal to the Secretary of the Interior from the decision of the Examiner of Inheritance. On appeal, pursuant to delegated authority, the Regional Solicitor for the Tulsa Region of the Office of the Solicitor for the Department of the Interior, issued an Order on June 20, 1967, (App. 82-87) disapproving the Will of the decedent, George Chahsenah, which Order by the Regional Solicitor was the final administrative decision of the Secretary of the Interior relative to the approval or disapproval of the said Will. The said Order issued on June 20, 1967, stated that the Secretary of the Interior was withholding his approval of the Will dated March 14, 1963, because the decedent, George Chahsenah, had made no effort during his lifetime to support his natural (illegitimate) daughter and therefore, there had not been a just and equitable treatment of Dorita High Horse, the natural daughter of George Chahsenah, the decedent, by George Chahsenah. The Regional Solicitor, speaking for the Secretary of the Interior, stated that by the exercise of his discretionary responsibility, the Secretary of the Interior could disapprove the Will of the decedent because it did not achieve

a just and equitable treatment of his heir at law, which disapproval of said Will was in fact consummated by the Secretary of the Interior giving as his reasons for said disapproval the equitable reasons as aforestated. The Secretary of the Interior acting by and through the Regional Solicitor, agreed with the Examiner of Inheritance that the Will of George Chahsenah dated March 14, 1963, met all of the technical requirements for a valid Will and the factum of the Will was proper, but due to the failure of the Will to achieve a just and equitable treatment of the decedents heir at law, the Will was not and would not be approved by the Secretary of the Interior.

The Intervener, Dorita High Horse, filed her Answer to the Complaint of the Plaintiffs on September 27, 1967, (App. 12-16) and the Intervener also on the same date filed her Motion for Summary Judgment (App. 17-18). The Intervener, in her Answer, denied that the United States District Court had jurisdiction of the action under the Administrative Procedure Act and further denied that the Secretary of the Interior acted in an arbitrary, capricious and unreasonable manner in disapproving the Will of George Chahsenah and her Motion for Summary Judgment was based on the same allegations and premises contained in her Answer.

The Secretary of the Interior filed his Answer as the Defendant to the Complaint of the Plaintiffs on October 20th, 1967, (App. 19-22) and the Secretary of the Interior on the 31st day of October, 1967, filed his Motion for Summary Judgment (App. 23-24). The Secretary of the Interior in his Answer admitted that the United States District

Court had jurisdiction to review the decision of the Secretary of the Interior pursuant to the Administrative Procedure Act. (Emphasis Added). The Secretary of the Interior further denied in his Answer that he acted in an arbitrary, capricious and an unreasonable manner and further denied that there was any abuse of discretion by the action of the Secretary in disapproving the Will of George Chahsenah. The Secretary of the Interior in his Motion for Summary Judgment completely reversed the position that he had taken in his Answer relative to jurisdiction. In his Motion for Summary Judgment, the Secretary stated that the United States District Court was without jurisdiction to set aside the decision of the Secretary of the Interior for the reason that the decision of the Secretary of the Interior was made within the scope of his authority and was final and conclusive. The Motion further stated that the action of the Secretary of the Interior was not arbitrary or capricious and was not an abuse of his discretion.

The Plaintiffs filed their Motion for Summary Judgment on November 20, 1967, (App. 25-26) directing the Secretary of the Interior to approve the Will of George Chahsenah dated March 14, 1963, and to distribute his estate in accordance with the terms of said Will. The Plaintiffs in their Motion stated that the Secretary of the Interior acted in an arbitrary, capricious, and unreasonable manner and that there was an abuse of his discretion in his refusal to approve the Will of George Chahsenah. The Plaintiffs also stated in their Motion that the Secretary of the Interior made a decision based on an erroneous legal foundation and that he acted in excess of his statutory jurisdiction by disapproving the

Will of George Chahsenah for equitable reasons and the action of the Secretary in disapproving the Will of George Chahsenah was a misconception of his power and authority relative to the disapproval or approval of Wills of Indian testators whereby he attempted to substitute his will for that of the Indian testator. (Emphasis Added).

Judge Eubanks rendered his Memorandum Opinion (App. 27-37) dated December 18, 1967, after considering the Complaint, Motions for Summary Judgment, Briefs and the Administrative record which included evidence produced at the several administrative hearings before the Examiner of Inheritance, which administrative record was attached as an Exhibit to the Motion of the Secretary of the Interior for a Summary Judgment, which Administrative record has been omitted from the Appendix herein by stipulation and agreement, except portions of same which by agreement are contained in the Appendix. Judge Eubanks in his Memorandum Opinion found that the decedents Will was not an unnatural Will and he further found that it had been previously wrongfully determined that the Secretary of the Interior could use his approval powers to substitute his Will for that of the decedent testator. Judge Eubanks further found that if the Statute giving an Indian testator the right to make a Will is to be meaningful, the Indian testator must be given a free hand to decide upon those persons who shall be the objects of his bounty without unreasonable Secretarial interference. Judge Eubanks also found that the denial of the approval of the last Will and Testament of George Chahsenah by the Secretary of the Interior lacked rational basis and was an unreasonable and arbitrary denial of the right conferred upon an Indian by Congress

to make his last Will and Testament. The Motion of the Plaintiffs for Summary Judgment was granted and Judge Eubanks directed the preparing of a formal Judgment in accordance with his Opinion.

A formal Judgment was rendered by District Judge Eubanks (App. 38-39) on December 28, 1967, ordering and directing that the last Will and Testament dated March 14, 1963, of George Chahsenah, a deceased Comanche Unallottee Indian, be approved by the Secretary of the Interior, and Judge Eubanks further ordered that the Estate of the said Indian be distributed in accordance with the terms of the last Will of the said decedent and the said formal Judgment further found that the Court had determined that it had jurisdiction of the cause of action in question.

An appeal from the Judgment of the Trial Court was taken to the Circuit Court of Appeals for the Tenth Circuit by Stewart L. Udall, Secretary of the Interior (App. 42) dated February 20, 1968, and by Dorita High Horse, Intervener (App. 43) dated February 26, 1968.

The Court of Appeals for the Tenth Circuit rendered its Opinion and decision (App. 44-47) dated March 3, 1969. The Court of Appeals held in its Opinion that the basic facts were without dispute as briefly summarized in its Opinion. The Court of Appeals further found that the Trial Court did not have jurisdiction to review the Orders of the Secretary of the Interior concerning either intestate succession of deceased Indians or the approval or disapproval of Wills of Indian testators giving as its authority two recent decisions of the Tenth Circuit: Heffelman vs. Udall 378 F. 2d 109 (1967) and Attocknie vs. Udall

390 F. 2d 636 (1968) Cert. den. October 14, 1968, 393 U.S. 833, 89 S. Ct. 104, 21 L. Ed 2d 104, and the Court of Appeals directed that the action and Complaint be dismissed for want of jurisdiction.

An examination of Heffelman vs. Udall Supra and Attocknie vs. Udall Supra will reveal that the United States Court of Appeals for the Tenth Circuit has held that 25 U.S.C. 373 complements 25 U.S.C. 372 and where 25 U.S.C. 372 has a proviso that states that the decision of the Secretary of the Interior determining the heirship of a deceased Indian who died intestate shall be final and conclusive and is therefore not subject to Judicial review under the Administrative Procedure Act or other applicable Statutes and that the same reasoning applies to 25 U.S.C. 373 relative to the approval or disapproval by the Secretary of the Interior of Wills of Indian testators even though the final and conclusive clause or proviso does not appear in 25 U.S.C. 373.

Formal Judgments were rendered by the Circuit Court of Appeals in the companion cases of Dorita High Horse, Appellant vs. the Appellees, and Stewart L. Udall, the Appellant, vs. the Appellees, on March 3, 1969, (App. 48-49) which formal Judgments directed that the Judgment in the Trial Court be vacated and the action be dismissed for want of jurisdiction.

The Appellees (Plaintiffs herein) filed their Petition for Rehearing before the Circuit Court of Appeals for the Tenth Circuit (App. 50-61) on March 24, 1969, which Petition was denied by the Court of Appeals (App. 62) on April 8, 1969.

SUMMARY FOR ARGUMENT

The Secretary of the Interior on appeal from a hearing held by the Examiner of Inheritance refused to approve the Will of George Chahsenah, a Comanche Indian, who had devised and bequeathed his trust property to a niece and three of her children. The action of the Secretary of the Interior reversed the Examiner of Inheritance for the Department of the Interior who had ruled that the factum of the Will was satisfactory and that same should be upheld and approved by the Secretary of the Interior. The decision of the Secretary of the Interior was the final administrative decision and the Secretary of the Interior stated that the decedent Indian did not by his Will achieve and consummate an equitable treatment of his natural (illegitimate) daughter, one Dorita High Horse. The Secretary of the Interior further stated that by the exercise of his discretionary responsibility, he could disapprove the Will of the Indian testator even though the factum of the Will was satisfactory, which he did in fact do by refusing to approve the Will. The disapproval or non-approval of the Will of the Indian testator resulted in the estate of the decedent Indian becoming vested solely in Dorita High Horse, his natural (illegitimate) daughter, which also further resulted in the niece of the decedent Indian and her children, who were the devisees and legatees in the Will of the decedent Indian, being eliminated as devisees and legatees of the decedent Indian and thereby receiving no part or portion of his estate.

The Secretary of the Interior was not authorized to withhold the approval of the Will of the decedent Indian for equitable reasons and his action was a misconception of his power and authority relative to the approval

or disapproval of Wills of Indian testators and he attempted to substitute his Will for that of the Indian testator. The attempt herein by the Secretary of the Interior to disapprove Wills of Indian testators for equitable reasons was a complete reversal of the interpretation that has formerly been given to the Statutes and Regulations governing the execution of Wills by Indians devising, bequeathing, and willing their trust properties. In numerous prior decisions by the Secretary of the Interior, the Secretary has approved Wills that did not achieve or consummate an equitable treatment of the heirs at law of the decedent Indian and the Estate of Wook-Kah-Nah 65 ID 436 confirms this premise. The administrative decision of the Secretary of the Interior approving the Will of Wook-Kah-Nah was ratified and confirmed by the Circuit Court of Appeals for the District of Columbia in Asenap v. Huff, 312 F.2d 358 (1962). Wook-Kah-Nah was an aged, illiterate, full-blood Comanche Indian woman at the time she made her Will. By her Will she gave lands having very valuable oil runs from same to two of her children and she gave other properties of nominal value to her four other children and two grandchildren. The Secretary of the Interior approved the Will of Wook-Kah-Nah even though her Will was diligently contested and the equity theory was never advanced by the Secretary of the Interior as a reason for him to disapprove her Will. On Judicial review, Asenap vs. Huff supra, the Court of Appeals for the District of Columbia confirmed the decision of the Secretary of the Interior with the result that the Will of Wook-Kah-Nah remained as an approved Will and the Estate of Wook-Kah-Nah was distributed very unequitable or uneven in so far as her heirs at law were concerned.

The Indian Law Book in the 1958 Revision by the Secretary of the Interior also states that the Wills of Indian testators are to be their own Wills and that the Secretary of the Interior cannot change the terms of the Wills of Indian testators and the Indian Law Book cites as authority a Memorandum addressed to the Assistant Secretary of the Interior dated May 10, 1941. The Solicitor for the Secretary of the Interior acting by and through the Chief of the Indian Division was the author and composer of said Memorandum. The Solicitor said "Whatever discretion the Secretary may have in the matter of approving or disapproving the Will, it is clear that this discretion should not be exercised to the extent of substituting his Will for that of the testator." The Secretary of the Interior in this case decided that the Indian testator did not make a proper Will and the Will was not equitable and by refusing to approve the Will of the Indian testator, the Secretary of the Interior actually substituted his Will for the Will of the Indian testator. This action by the Secretary of the Interior was based on an erroneous legal foundation and was an arbitrary and capricious act and his actions lacked a rational basis and was an unreasonable and arbitrary denial of the right of the Indian testator to make his Will as conferred upon him by Congress.

A Complaint was filed in the United States District Court by the legatees and devisees of the Indian testator for Judicial review of the action of the Secretary of the Interior in not approving the Will of the Indian testator giving as his reason for non-approval of said Will the reason that the Will

did not achieve an equitable treatment of the heir at law of the decedent, namely, Dorita High Horse, his natural or illegitimate daughter. Dorita High Horse was allowed to intervene and after the issues were joined, the United States District Court held that it had jurisdiction under the Administrative Procedure Act to review the action of the Secretary of the Interior and also jurisdiction under 28 U.S.C. 1361, which Statute gave the United States District Court original jurisdiction in any action in the nature of a mandamus to compel an officer or employee of the United States to perform a duty owed to the Plaintiffs. The Trial Court directed the Secretary of the Interior to approve the Will of the Indian testator and distribute his estate in accordance with his said Will because the factum of the Will was found to be satisfactory and it thereby became the duty of the Secretary of the Interior to approve the Will where the factum of the Will was satisfactory and the Trial Court disapproved the equity theory as advanced by the Secretary of the Interior as a reason for the non-approval of Wills of Indian testators.

The Secretary of the Interior and Dorita High Horse appealed to the Circuit Court of Appeals for the Tenth Circuit and the Court of Appeals in its decision rendered on appeal High Horse vs. Tate 407 F.2d 394 (1969) held that the Trial Court did not have jurisdiction under the Administrative Procedure Act to give Judicial review to the action of the Secretary of the Interior in approving or disapproving the Will of a decedent Indian giving as its authority for this holding the decision in two recent cases cited by the

Court of Appeals for the Tenth Circuit, namely, Heffelman vs. Udall 378 F.2d 109 (10th Cir. 1967) and Attocknie vs. Udall 390 F.2d 636 (10th Cir. 1968). The Heffelman case *supra* and the Attocknie case *supra* held that Judicial review of the action of the Secretary of the Interior in approving or disapproving Wills of Indian testators was not subject to Judicial review because Section 25 U.S.C. 372 and Section 25 U.S.C. 373 complement each other and 25 U.S.C. 372 has a statement or clause in same that the decision of the Secretary of the Interior in determining the heirs of a deceased Indian shall be final and conclusive and therefore the final and conclusive clause applied to the action of the Secretary of the Interior in approving or not approving the Will of a decedent Indian under 25 U.S.C. 373 even though 25 U.S.C. 373 does not contain the final and conclusive clause within the provision of the said Statute.

The Court of Appeals for the Tenth Circuit failed to take cognizance of the fact that the Trial Court had taken jurisdiction herein under both the Administrative Procedure Act and also in mandamus pursuant to 28 U.S.C. 1361. The decision of the Court of Appeals, High Horse vs. Tate *supra*, is cast solely upon the theory that the Trial Court did not have jurisdiction of the action for the reason that the final and conclusive clause prohibits and bars the action under the Administrative Procedure Act because the Administrative Procedure Act does not permit Judicial review to an administrative decision where the Statute states that the administrative decision shall be final or final and conclusive. It is the contention of the legatees and devisees of the Indian testator that 25 U.S.C. 372 does not complement 25 U.S.C. 373 and therefore the final and conclusive clause does not apply to

25 U.S.C. 373. The Trial Court, therefore, had jurisdiction under the Administrative Procedure Act to give Judicial review to the decision of the Secretary of the Interior when he acted in an arbitrary and capricious manner and made a decision based on an erroneous legal foundation by his refusal to approve the Will of the Indian testator for equitable reasons. The primary authority for this contention is Homovich vs. Chapman 191 F.2d 761 (D.C. Cir. 1951) and the same theory was also cogently developed in the dissenting Opinion of Circuit Judge Burger in Hayes vs. Seaton 270 F.2d 319 (1959) Cert. den. 364 U.S. 814, Rehearing for Cer. den. 364 U.S. 906.

This Court has, on several different occasions held that the Statutes stating that the administrative action is final or final and conclusive does not necessarily prohibit Judicial review of same and this Court has given and granted Judicial review in different instances and particularly in the immigration cases and in the draft board cases. A draft board case exemplifying this reasoning is Estep vs. United States 327 U.S. 114, 66 S.C. 423, 90 L. Ed. 567 (1946).

The Trial Court had authority and jurisdiction to order the approval of the Will of the Indian testator by the Secretary of the Interior in the nature of a mandamus. Jurisdiction and venue for actions in the nature of mandamus are now vested in all of the United States District Courts pursuant to 28 U.S.C. 1361 and 28 U.S.C. 1391, Ashe vs. McNamara 355 F.2d 277 (1st Cir. 1965).

When the Secretary of the Interior acts without a legal foundation for his action, he is subject to mandamus and this

Court has so held in Lane vs. Hoglund 244 U.S. 174 (1917), 61 L. Ed. 1066, 37 S.C. 558.

The legatees and devisees of the Indian testator herein further state that the decedent Indian was given the right to make his Will of trust property by Congress and it was never the intent and purpose of Congress to give the Secretary of the Interior the arbitrary authority to disapprove the Will of an Indian for equitable reasons if the factum of the Will was proper and complied with the Statutes and Regulations.

This Court may, after considering the temporal depth of the existing legislation, make a determination that Judicial review can be given to the adjudication of heirs of Indians dying intestate and the approval or disapproval of their Wills by the Secretary of the Interior under both 25 U.S.C. 372 and 25 U.S.C. 373 even though the final and conclusive clause appears in 25 U.S.C. 372, which would be a change from the former decisions of this Court that Judicial review can not be given to the determination of heirs of an Indian dying intestate by the Secretary of the Interior. This Court will, doubtless, decide herein whether or not Judicial review can be given to a decision of the Secretary of the Interior in the approving or failing to approve the Will of Indian testators and this decision will perhaps be promulgated even though the former decisions of this Court relative to the fact that there is no jurisdiction to give Judicial review of the decision of the Secretary of the Interior in determining the heirs of decedent Indians who die intestate are left in tact and are not disturbed by the Court at the present time.

ARGUMENT

I

THE REFUSAL OF THE SECRETARY OF THE INTERIOR TO APPROVE THE WILL OF THE DECEDENT INDIAN HEREIN FOR EQUITABLE REASONS AMOUNTED TO THE SECRETARY OF THE INTERIOR SUBSTITUTING HIS WILL FOR THAT OF THE INDIAN TESTATOR, WHICH REFUSAL OF THE SECRETARY OF THE INTERIOR WAS CONTRA TO THE INTERPRETATION THAT WAS FORMERLY GIVEN TO THE STATUTES AUTHORIZING APPROVAL OF WILLS OF INDIAN TESTATORS BY THE SECRETARY OF THE INTERIOR AND ALSO CONTRA TO THE REGULATIONS AND RULES PROMULGATED BY THE SECRETARY OF THE INTERIOR AND THE COMMISSIONER OF INDIAN AFFAIRS RELATIVE TO THE EXECUTION OF WILLS BY INDIAN TESTATORS PURSUANT TO SAID STATUTES.

The legatees and devisees of the Indian testator state that the Secretary of the Interior by refusing to approve the Will of George Chahsenah, the Indian testator, for equitable reasons took a position contra to the interpretation that was formerly given by the Secretary of the Interior and the Courts to 25 U.S.C. 373.

The legatees and devisees of the Indian testator further state that the Bureau of Indian Affairs and the Secretary of the Interior originally interpreted that the Secretary of the Interior was without authority to change the provisions of the Will of an Indian and the authority for this interpretation is the 1958 revision of the

Indian Law Book published under the authority of the United States Department of the Interior at Page 813, which states as follows:

"The authority of the Secretary of the Interior is limited to approval or disapproval of an Indian will, and he is without authority to change the provisions of the will by making a different provision than that provided by the testator." (Memo. Sol. I.D., May 10, 1941.)

The legatees and devisees of the Indian testator further state that the Solicitor's Memorandum of May 10, 1941, referred to in the citation from the Indian Law Book supra is set out verbatim (App. B 1-3) infra and the refusal of the Secretary of the Interior to approve the Will of the decedent Indian herein for equitable reasons amounted to the Secretary of the Interior substituting his will for that of the Indian testator and was not permissible pursuant to the Solicitor's Memorandum of May 10, 1941, supra.

The legatees and devisees of the Indian testator further state that the Secretary of the Interior in prior decisions, has not used the equity theory as a reason for the withholding of approval of Wills of Indian testators. The legatees and devisees wish to call to the attention of the Court the Estate of Wook-Kah-Nah, deceased Comanche Allottee No. 927, which is IA-855 and has been published in the Interior Decisions and is cited at 65 ID 436. This decision was rendered by the acting Solicitor for the Department of the Interior on October 21, 1958, whereon on Appeal, he approved the decision of the Examiner of Inheritance,

who had approved in the hearing before him, the last Will and Testament of Wook-Kah-Nah. Wook-Kah-Nah left as her heirs at law, six children and two grandchildren and in her Will she gave the lands on which there were valuable oil wells to two of her children. In other words, two of her children were favored far beyond the rest of her children and grandchildren. In evidence produced at the hearing before the Examiner of Inheritance, it was found that she was an illiterate, aged Indian woman who could not read or write, but nevertheless, the acting Solicitor of the Department of the Interior approved the Will and he made the following statement in his Opinion approving the Will and in approving the Opinion of the Examiner of Inheritance:

"It is apparent from the record that the testatrix, Wook-Kah-Nah, knew each of her children and was aware of each one's financial status; she knew in a general way all of her properties and which were of greater value; she knew that she was receiving large royalty payments from the oil produced from her own allotment and she had a definite plan for the distribution of her estate in a manner which she believed would best meet the needs of her children and satisfy her own desires. It is evident that the testatrix demonstrated a sufficient capacity to satisfy the requirements for the validity of her will made of February 20, 1954."

If the Solicitor would have desired to use the equity theory, he could have withheld the approval of the Will of Wook-Kah-Nah

and he could have stated that equity would be disbursed more evenly if the oil runs were disbursed among her children instead of going to two of her children as her Will provided.

The legatees and devisees of the Indian testator further state that another case where the Secretary of the Interior and the Court could have used the equity theory for disapproving the Will of an Indian testator if that is the proper and correct theory, is the case of Homovich vs. Chapman, 191 F. 2d 761 (D.C. Cir. 1951). Herbert Homovich was a Comanche Indian who made his Will on June 4th, 1947, wherein he left his estate consisting of valuable oil properties to various collateral heirs and subsequently thereto on April 10th, 1948, the decedent was married to Neoma Homovich. Later the same year and on September 30, 1948, Homovich died without changing or revoking his Will. His widow, Neoma Homovich, made an attack on his Will and the principal ground for her attack was that the Will was revoked by the operation of Oklahoma Law, which Oklahoma Law provided that a Will is revoked if the testator marries after the Will was executed. It was held in the hearings before the Department of the Interior and in the Federal Courts that the Oklahoma Law had no application to the validity of Wills of Indians disposing of their restricted and trust property and therefore there was no revocation of the Will of Herbert Homovich and his Will was upheld. If Homovich's Will had been disapproved for equitable reasons, his Estate would have descended and vested by intestate succession to his widow and his mother. His Will which was approved by the Secretary of the Interior distributed his Estate to various collateral relatives

who were not his next of kin because he omitted his mother, two sisters, a brother and, of course, his widow from the terms of his Will. The Secretary of the Interior and the Federal Courts, apparently in 1951, disagreed with the theory now promulgated by the Secretary of the Interior that the Wills of Indian testators may be left unapproved if the Wills do not make an equitable distribution and consideration of the Indians heirs at law. (App. 84-85).

"When a purported will is submitted for approval and it has been determined that it meets the technical requirements for a valid will, further consideration must be given before approving or disapproving it to determine whether approval will most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law." (Footnote deleted).

The legatees and devisees of the Indian testator further state that the applicable Code of Federal Regulations that were in effect when the Will of George Chahsenah was made and are still applicable are found in (App. A 1-4) infra. An examination of the said Regulations show a complete absence of any Regulations regarding the theory that the Will of the Indian testator must be equitable in so far as the heirs at law of the decedent Indian are concerned. A study of the Regulations will reveal that the Regulations governing the approval or disapproval of the Will of an Indian testator by the Secretary of the Interior are similar to and in the same manner as a Court sitting for the purpose of probating or disapproving

Wills of non-Indian testators for the usual customary reasons and grounds. The Courts attention is directed particularly to paragraph 15.3 of said Regulations:

"§ 15.3 Contents of notice. The notice shall state that the examiner of inheritance, will at the time and place specified therein, take testimony to determine the heirs of the deceased Indian (naming him) and, if a will is offered for probate, testimony as to the validity of such will. The notice shall list the presumptive heirs of the decedent, and if a will is offered for probate, the beneficiaries under such will and the attesting witnesses to the will. The notice shall cite the regulations in this part as the source of the legal authority and jurisdiction for the holding of the hearing. \* \* \*" (Emphasis Added).

The legatees and devisees of the Indian testator believe that the import of the Regulations issued by the Secretary of the Interior, which have the force and effect of law, are for the purpose of having a hearing in the manner of a Judicial hearing to prove the proper factum of the Will and that the Indian testator was free from undue influence and that he had proper mental capacity, and the Court will observe that the Regulations are entirely silent concerning Regulations directing the Indian to make an equitable devise of his estate in so far as his heirs at law are concerned.

Further proof of the absence of the equity theory for the interpretation of Indian testators can be found in Hanson vs.

Hoffman, 113 F. 2d 780 (10th Cir. 1940) at Page 789:

"It will be observed that under 25 U.S.C.A. § 373, *supra*, the death of Benjamin and the approval of the will did not free the allotments from restrictions, nor terminate the trust respecting the properties held by the Secretary. The three allotments remained restricted and the moneys derived therefrom, both before and subsequently to the death of Benjamin, and the lands conveyed to the Secretary remained subject to the trust, and to administration and control by the Secretary.

The restricted property and trust funds still being under the administrative control of the Secretary of the Interior, there can be no doubt of the power of the Secretary to have set aside the approval of the will on the ground of fraud in the execution of procurement of the will within one year from the date of the death of Benjamin, and to set aside the approval at any time on the ground of lack of testamentary capacity, undue influence, or failure to comply with the rules and regulations in connection with the execution of the will, or on the ground of fraud, failure of subordinate officers to report the true facts to the Secretary, or other like grounds whereby approval of the will was induced. *Lane v. U.S. ex rel. Mickadiet*, 241 U.S. 201, 207-209, 36 S. Ct. 599, 60 L.Ed. 956; *Nimrod, v. Jandron*, 58 App. D.C. 38, 24 F. 2d 613."

The legatees and devisees of the Indian testator direct the Court to another example that the equity theory has not been the criterion for the approval or disapproval of Wills of Indian testators in the past and we refer to Instructions to Field Officers (App. 66-67) and particularly Paragraph 3:

"3. Witnesses and testator must sign in the presence of each other. Read the will carefully to testator and be sure that he understands it and that it expresses his wishes."  
(Emphasis Added).

We thus see that the instructions that were given to the Field Attorneys of the Department of the Interior instructed them to make certain that the Will expressed the desire and will of the Indian testator relative to the distribution of his estate. The Affidavit of the scrivener of the Will (App. 69) is a detailed Affidavit relative to the customary requirements for the execution of a valid Will, but again no mention is made in the Affidavit of a requirement that the testator has performed equity in his Will in so far as his heirs at law are concerned. We direct the Court to the FOURTH paragraph of the last Will and Testament of George Chahsenah (App. 64):

"FOURTH: I leave nothing to my heirs at law except those persons hereinbefore mentioned for the reason that they have shown no interest in me."

which statement gave the reason of George Chahsenah for excluding from his Will all of his heirs at law other than the devisees and legatees named in said Will who, of course, are

the Petitioners herein except for certain parties who have been substituted due to the death of a portion of the devisees and legatees. The exclusion included Dorita High Horse, who was found to be the natural daughter of George Chahsenah by the Examiner of Inheritance and by the Secretary of the Interior on appeal, but the validity of said finding did not completely convince Judge Eubanks of the Trial Court that Dorita High Horse was the natural daughter of George Chahsenah, the decedent herein because the birth certificate prepared at the time of the birth showed the father of Dorita High Horse to be another person other than George Chahsenah. (Footnote 6, App. 32-33).

The legatees and devisees of the Indian testator further state that there is no general requirement and it is contra to the general accepted Law of Wills that testators must make Wills in an equitable manner. A valid statement of the General Law can be found in Page on Wills Revised Treatise 1960, Volume 1, Pages 88, 89, and 90:

"§ 3.11 Power to make unfair, unnatural will  
A statute which regulates the scheme of succession by intestacy has no bearing in the determination of the validity of a will that departs from the intestate formula nor does it in any way render such a will invalid. Obviously, the very purpose for which freedom of testation is given is to facilitate a departure from the inflexible laws of inheritance and to permit a testator to discriminate among his children and other objects of his bounty according to the dictates of his personal sense of justice. For this reason, departure from the intestate scheme on the part of the testators is more to be anticipated than is conformity thereto. The

power to make a will is a power that belongs to the testator and is not a veto power of the court or jury. Within the limits fixed by statute, the testator may dispose of his property by will as he pleases. (Emphasis Added).

The fact that the disposition of the testator's property made by the will is capricious, unjust, spiteful, eccentric, revengeful or injudicious does not of itself render the will invalid. If the testator had mental capacity and was free of undue influence and fraud, testamentary freedom is his to do with as he pleases, subject only to statutory restrictions." (Voluminous Footnotes deleted).

The legatees and devisees of the Indian testator in conclusion for Part I of Argument state that the Courts show "great deference to the interpretation given (a) statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16 85 S. Ct. 792, 801, 13 L. Ed 2d 616; Gardner vs. Brian, 369 F.2d 443 (10th Cir.). It is their considered opinion that the Secretary of the Interior without a change in the applicable Regulations or without a change in the applicable Statutes should not change his previous interpretation of the Regulations and Statutes, which he did by using the equitable theory as his reason for not approving the Will of the decedent testator Indian, which theory was contra to the previous interpretation given to the applicable Statutes and Regulations by the Secretary of the Interior and by the Courts.

II

SECTION 1 OF THE 1910 ACT (25 U.S.C. 372) AND SECTION 2 of the 1910 ACT AS AMENDED (25 U.S.C. 373) SHOULD NOT BE HELD AND CONSIDERED AS COMPLEMENTING EACH OTHER WITH RESPECT TO THE FINALITY OF THE ADMINISTRATIVE DETERMINATION OF FACTS BY THE SECRETARY OF THE INTERIOR RELATIVE TO THE DETERMINING OF HEIRS AT LAW OF DECEASED INTESTATE INDIANS (25 U.S.C. 372) AND THE APPROVAL OR DISAPPROVAL OF WILLS OF DECEASED INDIANS (25 U.S.C. 373) AND SECTION 1 OF THE 1910 ACT (25 U.S.C. 372) SHOULD NOT BE HELD TO PRECLUDE JUDICIAL REVIEW EVEN THOUGH THE PHRASEOLOGY "FINAL AND CONCLUSIVE" IS CONTAINED IN THE SAID STATUTE.

The legatees and devisees of the Indian testator realize that Part II of their Argument as set out immediately above is almost a direct converse of the statements and findings of the Court of Appeals for the Tenth Circuit in certain cases that will be hereinafter set out.

The first case of the Court of Appeals for examination is Heffelman vs. Udall, 1967, 10th Cir., 378 F.2d 109, cert. den. Nov. 7, 1967, 389 U.S. 926, 88 S. Ct. 287, 19 L. Ed 2d 278. This case concerned an Estate of an unallotted Quapaw Indian who died testate leaving a Will with the proviso in her Will that if she remarried, one-third of her estate would vest in her surviving husband. One Charles W. Heffelman made a claim in the administrative hearings that he was the

common law husband of Louise Wilson, the decedent. The Secretary of the Interior made a determination that Heffelman was not the husband of the decedent Indian. An action was filed in the United States District Court for review of the decision of the Secretary of the Interior pursuant to the Administrative Procedure Act and the action was dismissed by the United States District Court. Circuit Judge Lewis on appeal upheld the dismissal of the action by the United States District Court and Circuit Judge Lewis said in part at Page 112 as follows:

"\* \* \* Rather, we are urged to hold that the absence or presence of a will is the determinative premise upon which jurisdiction to review the Secretary's finding of a question of fact is dependent. To so hold, we believe, would reduce 'the act of Congress (the Act of June 25, 1910) \* \* \* to impotence by its contradictions.' *Blanset v. Cardin*, 256 U.S. 319, 325, 41 S. Ct. 519, 522, 65 L.Ed. 950. Certainly, if Louise Wilson had died intestate, the rejection of appellant's claim to heirship and the Secretary's finding would not be subject to judicial review. *Henrietta First Moon v. Starling White Tail*, 270 U.S. 243, 46 S.Ct. 246, 70 L.Ed. 565. While there may be legal distinctions to be drawn between the claim of an heir and the claim of a legatee, it would be illogical and contrary to the whole history of laws governing Indian property to ascribe to Congress by way of a negative inference an intention to provide the Secretary of

the Interior with unfettered discretion on the one hand but not on the other. We think that as long as an Indian allotment remains subject to the Secretary's control, cf. *Hanson v. Hoffman*, 10 Cir., 113 F. 2d 780, sections 1 and 2 of the Act of 1910 should be viewed as complementing each other with respect to the finality of the administrative determination of facts. We accordingly conclude that such a determination comes within the jurisdictional exception stated in section 10 of the Administrative Procedure Act.'" 378 F.2d 112. (Footnote deleted).

On Appeal, Judge Lewis held that Sections 1 and 2 of the 1910 Act complemented each other and the final and conclusive clause of Section 1 therefore also applied to Section 2 of the 1910 Act and therefore there was no jurisdiction to give Judicial review to a decision of the Secretary of the Interior relative to the approval or disapproval of the Will of an Indian testator. The Trial Court in the Heffelman case supra did not take jurisdiction in mandamus pursuant to 28 U.S.C. 1361, which jurisdiction was taken by the Trial Court in the case under consideration in addition to jurisdiction under the Administrative Procedure Act.

The next decision by the Court of Appeals for the Tenth Circuit is Attocknie vs. Udall 390 F.2d 636 (10th Cir. 1968), Cert. den. 393 U.S. 833, 89 S.C. 104, 21 L.Ed 2d 104. Circuit Judge Seth in his opinion reviewed the facts of the case which facts were that the Examiner of Inheritance and the Secretary of the Interior on appeal both had held that even though the Indian testator made a provision in his Will which stated that I leave nothing to Willis Attocknie because he is not my son and

even though Willis Attocknie was the illegitimate son of the decedent, the Will was upheld and held to be a valid Will. Circuit Judge Seth held on the authority of Heffelman vs. Udall, 378 F.2d 109 (10th Cir. 1967) that Section 1 and Section 2 of the Act of 1910 (25 U.S.C. 372-373) complement each other with respect to the finality of the Administrative determination of facts and that such a determination came within the jurisdiction exception stated in Section 10 of the Administrative Procedure Act and therefore the United States District Court did not have jurisdiction under the Administrative Procedure Act to give Judicial review to the actions of the Secretary of the Interior in approving or disapproving the Will of deceased Indian testators.

The legatees and devisees of the Indian testator believe that Attocknie vs. Udall supra was the first time that any United States Court of Appeals held directly in point that the United States Courts did not have jurisdiction to give Judicial review to the approval or disapproval of the Will of a deceased Indian testator pursuant to 25 U.S.C. 373 and that the final and conclusive prohibition found in 25 U.S.C. 372 applies to 25 U.S.C. 373 and therefore the legal review was not permissible under the Administrative Procedure Act which Act provides that Judicial review cannot be given under said Act if there is statutory prohibition against review.

The Court of Appeals for the Tenth Circuit a short time later when this case now under consideration by this Court came on for hearing, High Horse vs. Tate, 407 F.2d 394 (10th Cir. 1969), held that the District Court of the United States did not have jurisdiction to give Judicial review of

the action of the Secretary of the Interior in approving or disapproving Wills of Indian testators affecting their restricted Indian property and the Court gave as authority for said holding its recent decision in Heffelman vs. Udall supra and Attocknie vs. Udall supra.

The legatees and devisees of the Indian testator would like to call to the attention of the Court the 1958 Revision of the Indian Law Book published under the authority of the United States Department of the Interior relative to Section 1 and Section 2 of the 1910 Act together with other Sections of the 1910 Act and from said book there appears at Pages 122 and 123 the following:

"The act of June 25, 1910,<sup>6</sup> constituted what is probably the most important revision of the General Allotment Act that has been made. Based on 33 years of experience in the administration of the act, it sought to fill gaps and deficiencies brought to light in the course of that period. These related particularly (a) to the administration of estates of allottees, (b) to the making of leases and timber contracts for allotted lands, and (c) to the cancellation or relinquishment of trust patents.

Section 1 of this act <sup>7</sup> set forth a comprehensive plan for the administration of allottees' estates, con-

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6 36 Stat. 855.

7 36 Stat. 855, 25 U.S.C. 372

ferring plenary authority upon the Secretary of the Interior to administer such estates and to sell heirship lands. Section 2 <sup>8</sup> authorized testamentary disposition of allotments with the approval of the Secretary of the Interior and the Commissioner of Indian Affairs. Section 3 <sup>9</sup> permitted relinquishment of allotments by allottees in favor of unallotted children, who had been completely ignored in the original scheme of allotment to living Indians.

Section 4 of the act <sup>10</sup> permitted leasing of Indian allotments held by trust patent for periods not to exceed 5 years in accordance with regulations of the Secretary of the Interior, and conferred upon the Secretary power to supervise or expend for the Indians' benefit the rentals thereby received. Section 5 <sup>11</sup> made it unlawful to induce an Indian to execute any conveyance of land held in trust, or interests therein. Section 6 <sup>12</sup> contained various provisions for the protection of Indian timber against trespass and fire. Section 7 <sup>13</sup> contained a

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| 8  | 36 Stat. 855, 856, 25 U.S.C. 373.        |
| 9  | 36 Stat. 855, 856, 25 U.S.C. 408.        |
| 10 | 36 Stat. 855, 856, 25 U.S.C. 403.        |
| 11 | 36 Stat. 855, 857, 25 U.S.C. 202.        |
| 12 | 36 Stat. 855, 857, 18 U.S.C. 1153, 1156. |
| 13 | 36 Stat. 855, 857, 25 U.S.C. 407.        |

general authorization for the sale of timber on unallotted lands under regulations prescribed by the Secretary of the Interior. Section 8 <sup>14</sup> contained a similar authorization for timber sales on restricted allotted lands.

Section 13 of the act <sup>15</sup> authorized the Secretary of the Interior to reserve from entry Indian power and reservoir sites, and the following section <sup>16</sup> authorized the Secretary of the Interior to cancel patents covering such sites upon making allotment of other lands of equal value and reimbursing the Indian for improvements on the canceled allotment. Other sections contained minor amendments to the General Allotment Act and related legislation. <sup>17</sup>

The provision of this act relating to testamentary disposition of allotments was amended and amplified by the act of February 14, 1913. <sup>18</sup> As amplified, the privilege of testamentary

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- 14 36 Stat. 855, 857, 25 U.S.C. 406.  
15 36 Stat. 855, 858, 43 U.S.C. 148.  
16 36 Stat. 855, 859, 25 U.S.C. 352.  
17 See sec. 16, 36 Stat. 855, 859 (incorporated in 25 U.S.C. 312) (rights-of-way); Sec. 17, 36 Stat. 855, 859 (incorporated in 25 U.S.C. 331) (amending secs. 1 and 4 of the original allotment act); sec. 31, 36 Stat. 855, 863, 25 U.S.C. 337 (allotments within national forests).  
18 37 Stat. 678. See 25 U.S.C. 373.

disposition subject to departmental approval was extended not only to Indians possessed of allotments, but also to Indians having individual Indian moneys or other property held in trust by the United States. 19"

This Court will observe that the Act of 1910 was an important revision of the General Allotment Act of 1887 and the said Act was composed of many different sections on various phases of Indian Law. The Court will further observe that Section 2 of the Act of 1910 was amended by the Act of February 14, 1913, and after the said amendment, it was not necessary to have the approval of the Commissioner of Indian Affairs for a Will made by an Indian as was required by the original Act of 1910, and after the amendment by the Act of 1913, the privilege of testamentary disposition with departmental approval was extended to Indian individuals having moneys or other property held in trust, which authority is not given to Indians dying intestate and whose estates are probated pursuant to Section 1 of the Act of 1910, (25 U.S.C. Sec. 372). It appears to the legatees and devisees that the argument that Section 1 of the said Act complements Section 2 of the said Act is not valid. Each Section of the Act of 1910 is a separate Section and each Section stands on its own contents as set out in said Section. The argument that Section 1 complements Section 2 of the said Act was presented by the Secretary of the Interior

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19 See also S. Rept. 720, 62d Cong., 2d sess., May 9, 1912, on H.R. 1332.

in Homovich vs. Chapman, 191 F.2d 761 in 1951 and in rejecting this argument the United States Circuit Court of Appeals for the District of Columbia Circuit stated at Page 764 as follows:

"(5) The Secretary maintains that his action in respect to the wills of Indians is not reviewable by the courts. But the actions of Secretaries in respect to these wills have been reviewed by the courts,<sup>5</sup> and no case to the contrary is cited to us. Such review is not precluded by the statute. The Secretary argues that, because Section 1 of the 1910 Act, dealing with the determination of the heirs of an Indian who dies without a will, provides that his determination 'shall be final and conclusive', therefore Section 2 of that Act, dealing with wills, must be read as though it contained a similar provision, although in fact it does not. We think it plain that, if Congress had meant that the decisions in Section 2 should be final and conclusive, it would have said so; in the immediately preceding paragraph it had so provided when it meant to do so. The mere fact that the acts of the Secretary in pro-

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5 See cases cited note 4 supra; also Nimrod v. Jandron, 1928, 58 App. D.C. 38, 24 F.2d 613.

viding regulations for the execution of these wills and in approving them, required the exercise of discretion and judgment on his part, does not preclude judicial review of his action. To be sure, if upon such review it appears that his action was within the scope of the authority conferred upon him, the court cannot disturb his decision. But that is a different rule from the rule of total non-reviewability. The Administrative Procedure Act (Section 10) <sup>6</sup> forbids judicial review only where statutes 'preclude' such review or where agency action is 'by law committed to agency discretion.' No statute 'precludes' this review, and the Secretary would have us stretch the second prohibitory clause far beyond its meaning. He says that

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6 60 Stat. 243 (1946), 5 U.S.C.A. § 1009. See discussion in *Kristensen v. McGrath*, 1949, 86 U.S. App. D.C. 48, 179 F.2d 796 (not discussed by Supreme Court, *McGrath v. Kristensen*, 1950, 340 U.S. 162, 169, 71 S.Ct. 224, 95 L.Ed. 173; also in *Air Line Dispatchers Ass'n, et al, v. National Mediation Board, et al.* 1951, 89 U.S. App. D.C., \_\_\_\_\_, 189 F.2d 685, and also in *Capital Transit Company v. United States*, 1951, D.C., 97 F. Supp. 614.

there can be no review where agency action 'involves' an element of discretion or judgment. Whether the court should set aside an agency action founded upon the exercise of discretion and judgment is, as we have said, a totally different question from whether the court may review the action for purposes of determining its validity.

The judgment of the District Court must be and is hereby

Affirmed."

The legatees and devisees of the Indian testator also wish to state that Judicial review under Section 2 of the Act of 1910 (25 U.S.C. Sec. 373) was given and jurisdiction taken by the District of Columbia Circuit for the Court of Appeals in Asenap vs. Huff, 312 F.2d 358 (1962). In the Per Curiam Opinion, the District of Columbia Court of Appeals stated that the examination of the Administrative record convinced the Court that the Secretary of the Interior was not acting in an arbitrary and capricious manner when he upheld the Will in question and therefore the United States District Court should have granted Summary Judgment with the result that the decision of the Secretary of the Interior approving the Will would not be set aside and the case was remanded accordingly. The Administrative record in question pertained to the Estate of Wook-kah-Nah, Comanche Allottee No. 927 which facts have been previously discussed in Argument I of this Brief under the citation of 65 ID 436. It is patent that the Court of Appeals for the District of

Columbia has, at least on two occasions, taken jurisdiction and given Judicial review to the approval or disapproval of the Wills of Indian testators pursuant to 25 U.S.C. 373; the cases being Homovich vs. Chapman supra and Asenap vs. Huff supra.

The legatees and devisees of the Indian testator are also cognizant of another important case decided by the Court of Appeals for the District of Columbia Circuit cited as Hayes vs. Seaton 270 F.2d 319 (1959), Cert. den. 374 U.S. 814, Rehearing for Cert. den. 364 U.S. 906. The legatees and devisees of the Indian testator are not going to make a detailed statement concerning this case in their Brief herein. The legatees and devisees of the Indian testator did state in their Brief for the case under consideration filed in the United States Court of Appeals for the Tenth Circuit in June, 1968, that they were in accord with the dissenting opinion in Hayes vs. Seaton supra, which opinion was rendered by Circuit Judge Burger and in their Brief of 1968 a considerable portion of the said dissenting opinion was quoted. They suggested in their Brief of June, 1968, that the Court of Appeals for the Tenth Circuit render a decision in accordance therewith in favor of the legatees and devisees of the Indian testator and that the United States District Court had jurisdiction to give Judicial review to the approval or disapproval of Wills of Indian testators under the Administrative Procedure Act and not mandamus, which suggestion was rejected by the Court of Appeals for the Tenth Circuit, as aforestated.

The legatees and devisees of the Indian testator are of the opinion that the reasons given by Circuit Judge Burger, now Justice Burger, for Judicial review in Hayes vs. Seaton

supra were, at that time persuasive and valid and are still persuasive and valid. Justice Burger, in his dissenting opinion in Hayes vs. Seaton supra, quoted from a Harvard Law Review article by Louis L. Jaffe. Professor Jaffe has now compiled having published in 1965 a treatise styled Judicial Control of Administrative Action and at Page 143 the following quote appears to your legatees and devisees herein to be persuasive of the position of your legatees and devisees herein:

"A statute may indeed exclude all occasions of judicial intervention. But a court will not lightly assume that an agency has been empowered to adjudicate any controversy which it chooses, and once this is granted, the notion of 'jurisdictional' limit enters the picture. Therefore, though the concept of jurisdiction is imprecise, a court will ordinarily assume that it has both the power and the duty to determine a question asserted to be jurisdictional. Behind such an assumption, of course, there stands the major premise that the judiciary is the ultimate guarantor of legality, that judicial control of official action is, therefore, the rule, and exclusion the exception."

The legatees and devisees of the Indian testator are cognizant of the many cases that have been decided by this Court under different Statutes, such as the draft statute and the immigration statute where the statute contains the phraseology that the administrative decision is final or final and conclusive. Nevertheless, this Court has taken jurisdiction and granted Judicial review of the administrative decisions in many instances. A prime example of giving Judicial review to a statute of this nature is the case of Estep vs. U.S. 327 U.S. 114, 66 S.Ct. 423, 90 L. Ed 567 (1946).

Another case that the legatees and devisees of the Indian testator would like for this Court to examine is Simmons vs. Eagle Seelatsee, E.D. Wash. 1965, 244 F. Supp. 808, aff'd without opinion, 384 U.S. 209, 86 S. Ct. 1459, 16 L.Ed. 2d 480. This litigation concerned a complaint against the Yakima Tribal Council, which had determined that the Plaintiffs would not receive any part or portion of a certain trust and restricted estate because they did not have one-fourth (1/4) or more blood of the Yakima tribe. The pleadings developed that the Examiner of Inheritance had made a finding that the Plaintiffs did not qualify to take as a heir of the deceased Indian because of the inability to meet the requirements of one-fourth (1/4) or more blood of the Yakima tribe, which determination by the Examiner was made pursuant to 25 U.S.C. Sec. 372. The United States intervened in the said suit and they filed a Motion to Dismiss the action primarily on jurisdictional grounds. The Court was sitting as a Court of three Judges due to the fact that the constitutionality of the Statute requiring the Indians to have one-fourth (1/4) or more blood of the Yakima tribe before they could inherit had been questioned. Judge Pope in rendering his decision of the three Judge Court stated as follows:

Pages 811 and 812:

"As we inquire whether on this record we can reach the merits of this case we are confronted with two statutory provisions. One is § 1 of the Act of August 15, 1894, c. 290, 28 Stat. 305 (25 U.S.C. § 345) set forth in the

margin, 5 which provides in substance that a person who is in whole or in part of Indian blood or descent-who is entitled to an allotment or who claims to have been unlawfully denied or excluded from any allotment may litigate his rights and claims in the proper district court of the United States, naming the United States as party defendant.

The important question at this point arises from the second and later enactment of the Act of June 25, 1910, c. 431, § 1, 36 Stat. 855 (25 U.S.C. § 372). This section provides that when an Indian to whom an allotment has been made dies before the expira-

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- 5 "§ 345. Actions for allotments-All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; \* \* \*

tion of the trust period 'the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.'

(1) As was noted in *Arenas v. United States*, 9 Cir., 197 F.2d 418, 420, 'the enactment of June 25, 1910 operated to withdraw from the courts jurisdiction to ascertain the heirs of the dead allottees holding under trust patents', citing *Hallowell v. Commons*, 239 U.S. 506, 36 S.Ct. 202, 60 L.Ed. 409, *United States v. Bowling*, 256 U.S. 484, 487, 41 S.Ct. 561, 65 L.Ed. 1054, and other cases.

If we apply that rule literally, if we say, using the words of the last mentioned Act that the decision here of the Secretary shall be 'final and conclusive', and at the same time recognize that there is here a substantial question of constitutional law, then we would be holding that the Secretary could act in an unconstitutional manner, and that his action could not be questioned;-that he had the power finally to determine a constitutional question.

Such a construction of this 'final and conclusive' provision can neither be thought to be within the intent of Congress nor can it be consistent with due process. A provision requiring such a construction would be wanting in due process. Such is the holding of *Ng Fung Ho v. White*, 259 U.S. 276, 284-285, 42

S. Ct. 492, 495, 66 L. Ed. 938.<sup>6</sup> It has been held that the action of the Secretary under this section of the Act of June 25, 1910, (25 U.S.C. § 372) is subject to review in a court of equity in a direct proceeding 'to inquire into and correct mistakes, injustice and wrong in both judicial and executive action.' *Hanson vs. Hoffman*, 10 Cir., 113 F.2d 780,791. \* \* \* (Footnote deleted).

The legatees and devisees of the Indian testator believe that this Court could very well make a judgment that due process is wanting as exemplified in *Simmons vs. Seelatsee* supra if same is used to prevent the Secretary of the Interior to give legal review to the action of the Secretary of the Interior under 25 U.S.C. 372, which of course would be a reversal of its earlier decisions made when the philosophy of the Court was different than it is at the present time and A Fortiori same argument applies to 25 U.S.C. 373 although the legatees and devisees of the Indian testator do not admit that 25 U.S.C. 372 and 25 U.S.C. 373 are complementary to each other in so far as the final and conclusive clause is concerned.

The legatees and devisees of the Indian testator presume this Court has noted that it confirmed and approved *Simmons vs. Seelatsee* supra without an opinion and the said case was held before three Judges therefore the opinion of the lower Court should be more persuasive than in many cases determined by the United States District Courts.

The legatees and devisees of the Indian testator further state that this Court has firmly established that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress and this Court has echoed this theme by noting that the Administrative Procedure Acts generous review provisions must be given a hospitable interpretation, Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 87 S. Ct. 1507, 1511, 18 L. Ed 2d 681 (1967), Shaughnessy v. Pedreiro, 349 U.S. 48, 51, 75 S. Ct. 591, 594, 99 L. Ed. 868, United States v. Interstate Commerce Comm'n, 337 U.S. 426, 433-435, 69 St. Ct. 1410, 1414-1415, 93 L. Ed. 1451; Brownell v. We Shung, 352 U.S. 180, 77 S. Ct. 252, 1 L. Ed. 2d 225; Heikkila v. Barber, 345 U.S. 229, 73 S. Ct. 603, 97 L. Ed 972.

The legatees and devisees of the Indian testator further state that Abbott Laboratories vs. Gardner supra which held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress," greatly expands the category of Plaintiffs who have standing to demand non-statutory review when applied to persons aggrieved or adversely affected and the legatees and devisees of the Indian testator and the Petitioners herein, are greatly aggrieved persons and adversely affected persons and should be granted jurisdictional review.

The legatees and devisees of the Indian testator believe that their Complaint stated a cause of action in equity against the Secretary of the Interior and the Administrative Procedure Act did not particularly enlarge the equitable grounds for relief if there are equitable grounds for relief. In Dixon vs. Cox 268 F. 285 (8th Cir. 1920) Circuit Judge Sanborn in discussing the complaint concerning Judicial review of the Secretary of the Interior's decision relative to Section 1 of the Act of 1910 (25 U.S.C. 372) stated at 289 as follows:

"The second question is: Did the complaint or proof in this suit set forth a cause of action in equity to avoid the Secretary's decision for fraud, error of law, or absence of substantial evidence to sustain it? Whether or not the weight of evidence in substantial conflict sustains one or the other side of an issue of fact is a question upon which the final decision of the Secretary in a case of this character is generally final and conclusive; but his decision upon this issue of heirship, like the decision of the Land Department, of the Dawes Commission, and of other quasi judicial tribunals, may undoubtedly be avoided by a suit in a court of equity on account of fraud which induced it, on account of error of law upon facts found, conceded, or established beyond dispute at the hearing before him, or on the ground that at the close of such hearing there was no evidence to support his finding on a

material issue of fact which controlled the result. *James v. Germania Iron Company*, 107 Fed. 597, 600, 601, 46 C.C.A. 476, 479, 480; *Howe v. Parker*, 190 Fed. 738, 746, 111 C.C.A. 466, 474.:  
(Emphasis Added).

The legatees and devisees of the Indian testator believe in the case under consideration they have come within the reason set out for relief in equity even if it should be held that the final and conclusive clause applied to 25 U.S.C. 373 even though the said clause is not expressly stated in the said Statute.

The legatees and devisees of the Indian testator remind this Court that in their Motion for Summary Judgment (App.25) the following, to-wit:

"3. The Defendant (The Secretary of the Interior) ignored the significant and substantial evidence offered on the controverted facts and made an erroneous decision which was contrary to Law."

was one of the several grounds that was given as a reason for the Court to sustain the Motion, which Motion was by the Trial Court sustained and granted and it is the opinion of the legatees and devisees herein that this ground comes within the express authority of Dixon vs. Cox supra.

III

THE TAKING AND EXERCISE OF JURISDICTION  
HEREIN BY THE TRIAL COURT PURSUANT TO  
28 U.S.C. 1361 IS A VALID AND PROPER  
DETERMINATION BY THE TRIAL COURT EVEN  
THOUGH "FINAL AND CONCLUSIVE" MIGHT  
BAR JURISDICTION HEREIN UNDER THE  
APA.

The legatees and devisees of the Indian  
testator state that Judge Eubanks, the Judge  
in the Trial Court in the case under considera-  
tion, (App. 27-37 at Footnote 1, Page 28)  
stated as follows:

"There can be no doubt but that  
this court has jurisdiction under  
28 U.S.C. § 1361, and upon that  
basis jurisdiction is taken here,  
as it has been by this court upon  
other occasions, in order to  
effectuate the purposes of the  
Administrative Procedure Act by  
providing the review function  
which the act contemplates."

Therefore, we see that in the Trial Court  
jurisdiction was taken by Judge Eubanks  
under 28 U.S.C. § 1361.

The legatees and devisees of the Indian  
testator further state that in Heffelman vs.  
Udall, 378 F.2d 109 (10th Cir., 1967) on  
appeal, the principal consideration of the  
Court of Appeals was that APA did not apply  
and permit Judicial review of the action of  
the Secretary of the Interior relative to

the approval or disapproval of the Estates and Wills of Indians because of the final and conclusive clause of Section 1 and Section 2 of the Act of 1910, (25 U.S.C. 372 and 25 U.S.C. 373). The Court of Appeals in Heffelman supra also stated that the Trial Court in Heffelman properly held that there was no jurisdiction under 28 U.S.C. § 1361, which is the exact converse of what the Trial Court did in this case under consideration because jurisdiction was expressly taken by the Trial Court under the authority of 28 U.S.C. § 1361. Consequently, Heffelman supra was not proper authority for the Court of Appeals for the Tenth Circuit for the reversal of this case.

The legatees and devisees of the Indian testator further state that Judge Eubanks, the Judge in the Trial Court (App. 27-37, Page 35) stated as follows:

"Congress has conferred the will making right upon all adult Indians. The only limitation upon that right is that the will must be approved by the Secretary of the Interior. It is incumbent upon the Secretary that he not lose sight of the fact that the will making right has been conferred upon the Indian and not upon the Secretary. Surely there must be a point beyond which the Secretary cannot go in withholding his approval before his act of disapproval is to amount to an arbitrary denial of the statutory will making right."

and the Trial Court further held that the denial of the approval of the Will by the Secretary of

the Interior acting by and through the Regional Solicitor of George Chahsenah lacked a rational basis and was an unreasonable and arbitrary denial of the right conferred by Congress upon the decedent Indian to make his Will, and therefore the Trial Court directed in the nature of a mandamus that the Secretary of the Interior approve the Will of the decedent Indian and distribute his estate in accordance with the provisions of the said Will.

The legatees and devisees of the Indian testator further state that authority for mandamus of the Secretary of the Interior was determined as a proper procedure in a similar situation by this Court, Garfield vs. United States of America, ex rel Goldsby, 211 U.S. 249, 29 S.C. 62, 53 L. ed. 168 (1908). The Secretary of the Interior was brought into Court for a writ of mandamus to require him to erase certain marks and notations by which his predecessor had taken Goldsby off of the approved membership rolls of the Chickasaw Indian Nation and for the further request that he be restored as a member of said Nation. This Court granted Goldsby the relief he requested.

Another decision by this Court is Lane vs. Hoglund, 244 U.S. 174 (1917), 61 L. ed. 1066, 37 S.C. 558. A writ of mandamus was issued against Franklin K. Lane, the Secretary of the Interior, by the Court of Appeals for the District of Columbia and on Appeal, this Court affirmed the Court of Appeals. The action was for a mandamus against the Secretary of the Interior to issue a patent to a homestead entryman where two (2) years had lapsed since the receiver's receipt of final entry and there was no pending contest or protest.

The legatees and devisees of the Indian testator believe that Lane vs. Hoglund supra can be compared with the case under consideration in many respects in so far as mandamus is concerned. This Court said in Lane vs. Hoglund supra that jurisdiction arises out of the situation that construction of the Statutes of the United States and the duty of the Secretary of the Interior thereunder are drawn in question, which statement also applies to the case under consideration herein. In Lane vs. Hoglund supra, there was a hearing held relative to the validity of the homestead entry before the local officers and the Commissioners of the Land Office relative to whether the homestead entry had been properly consummated. The local land officers found in favor of the entryman, but on appeal, the Secretary of the Interior reversed and ruled that the entry was not protected by the applicable two (2) year Statute and held that the entry had not been properly consummated by the entryman. In the case under consideration, the Examiner of Inheritance held the Will of the decedent Indian should be approved, but on Appeal the Secretary of the Interior held otherwise giving noncompliance with equity by the Indian testator as his reason for not approving the Will.

In Lane vs. Hoglund supra, this Court held that the practice had long been maintained that there could not be a valid protest of the entry within a two year period except by a public agent or a private citizen, which objected to the validity of the entry by the entryman and when an attempt was made based on a report by a forest officer to object to the validity of the entry made by the entryman, the

Secretary of the Interior was without authority to set aside the entry on the homestead and was subject to mandamus, which mandamus was granted. In arriving at this conclusion, this Court made a study of the prior administrative rulings of the Secretary of the Interior and also instructions given to the Field Offices. Similar material has been heretofore set out in this Brief *supra* for the benefit of this Court.

Near the conclusion of Lane v. Hoglund *supra*, we find the following pertinent statement by this Court in the U.S. Reports:

"True, this court always is reluctant to award or sustain a writ of mandamus against an executive officer, and yet cases sometimes arise when it is constrained by settled principles of law and the exigency of the particular situation to do so. *Kendall v. United States*, 12 Pet. 524, 9 L. ed. 1181; *United States v. Schurz*, 102 U.S. 378, 26 L. ed. 167, *Roberts v. United States*, 176 U.S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 376; *Garfield v. United States*, 211 U.S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; *Ballinger v. United States*, 216 U.S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338. And see *Noble v. Union River Logging R. Co.* 147 U.S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33. This, we think, is such a case. As quite apposite we excerpt the following from the unanimous

opinion in *Roberts v. United States*,  
176 U.S. 221, 231, 44 L. ed. 443, 447,  
20 Sup. Ct. Rep. 376:

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. \* \* \*"

The legatees and devisees of the Indian testator realize that prior to 1962 when a mandamus action was commenced against public officials such as the Secretary of the Interior, the applicable Court decision required same to be brought in the District of Columbia. The limitation of venue and jurisdiction for the United States District Courts, other than the District of Columbia District Courts, to entertain mandamus actions against public officials was changed by the passage of 76 Stat. 744 in 1962.

Ashe vs. McNamara, 355 F.2d 277 (1st Cir. 1965) very ably states the now applicable law relative to the present status of the jurisdiction of mandamus actions in all of the United States District Courts against public officials as follows at Page 279:

"At the outset, it merits mention that this action is brought under section 1361 of title 28, United States Code, part of a 1962 enactment which enlarged the jurisdiction of the district courts and liberalized venue. 76 Stat. 744. That statute explicitly gives all district courts now for the first time 'original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States \* \* \* to perform a duty owed to the plaintiff.' Moreover, an additional provision of the 1962 enactment, which is now section 1391 of title 28, creates venue for such an action at several places, among them the district in which the plaintiff resides, and in so doing expressly makes the defendant amenable to service by certified mail beyond the territorial limits of the district in which the action is brought. Thus, obstacles which until recently might have impeded this suit in any district other than the District of Columbia,<sup>2</sup> no longer exist."

- 
2. See Hart and Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 1186-87; Byse, Proposed Reforms in Federal 'Nonstatutory' Judicial Review: Sovereign Immunity, Indispensible Parties, Mandamus, 1962, 75 Harv. L. Rev. 1479; and Note, Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts, 1938, 38 COL. L. REV. 903.

This Court, upon reviewing the Appendix, will ascertain, of course, that this action was filed August 25, 1967, and therefore jurisdiction and venue in a mandamus action against the Secretary of the Interior could be and was entertained in the United States District Court for the Western District of Oklahoma.

The legatees and devisees of the Indian testator further state that the equitable reason given by the Secretary of the Interior acting by and through the Regional Solicitor for the disapproval of the decedent Indians Will in this case was not a valid or legal reason for the failure to approve the Will of the decedent Indian, therefore by the arbitrary denial of the right of the Indian to make a Will and have same approved, the Secretary of the Interior was therefore subject to an Order in the nature of a mandamus to approve said Will as he was directed and ordered to so do by the Trial Court herein, pursuant to jurisdiction and venue granted by 28 U.S.C. § 1361 and 1391 and even though it should be determined that the final and conclusive clause of 25 U.S.C. 372 complements 25 U.S.C. 373 and thereby determining that an action cannot be brought under the Administrative Procedure Act for Judicial review, this Court could order the approval of the Will by the Secretary of the Interior under jurisdiction granted by 28 U.S.C. 1361 as was done and ordered by the Trial Court herein and of course, the Trial Court also held that it had jurisdiction under the Administrative Procedure Act.

### CONCLUSION

Language on the Statute books in the field of Indian law, as in other fields of law, has only a tenuous relation to the law in action. The words of Court opinions in the field of Indian law also frequently have a tenuous relation to the actual holdings of the Court. The modern trend is to treat minority groups in a fair and equitable manner and the oldest and most persisting of the minority groups in the United States are the Indians. Not only is it important to realize the temporal depth of existing legislation concerning Indians and Indian tribes, but it is also important to appreciate the past existence of legislation which has technically ceased to exist. It appears to the legatees and devisees of the Indian testator that this Court may after considering the temporal depth of existing legislation determine that Judicial review can be given to the adjudication of heirship and to the approval or disapproval of Wills by the Secretary of the Interior under both 25 U.S.C. 372 and 25 U.S.C. 373 even though the final and conclusive clause appears in 25 U.S.C. 372, but if this Court should adjudicate and decide that final and conclusive is still applicable to 25 U.S.C. 372, it should hold and decide in the alternative that the Courts can give Judicial review of the actions of the Secretary of the Interior in approving or not approving Wills of Indian testators pursuant to 25 U.S.C. 373 which Statute does not contain the final and conclusive clause, and that the Trial Court had jurisdiction herein for the reasons aforestated.

President Nixon at the time of the resignation of former Chief Justice, Earl Warren, and upon the appointment of Warren E.

Burger as Chief Justice of this Court on the 23rd day of June, 1969, made the following . . observation concerning temporal depth:

"'Sixteen years have passed since the Chief Justice assumed his present position. These 16 years, without doubt, will be described by historians as years of greater change in America than any in our history.

'And that brings us to think of the mystery of Government in this country, and for that matter in the world, the secret of how Government can survive for free men. And we think of the terms 'change' and 'continuity'. Change without continuity can be anarchy. Change with continuity can mean progress. And continuity without change can mean no progress.'"

and we believe this Court may see fit to make a change of its interpretation of the applicable Statutes, which we believe will mean progress herein.

For the reasons stated herein, the Judgment of the Tenth Circuit should be reversed and the Judgment of the Trial Court should be upheld and confirmed and finalized.

Respectfully submitted,

OMER LUELLEN  
P.O. Box 96  
First State Bank Bldg.  
Hinton, Oklahoma 73047.  
Counsel for Petitioners

November, 1969

## APPENDIX A

The Code of Federal Regulations that are still in full force and effect and were in full force and effect when the Will of George Chahsenah, the decedent herein, was executed and when same was offered for probate and approval can be found in Title 25 of the Code of Federal Regulations, Subchapter C-Probate Part 15 and all Sections of Part 15 that pertain to the probate and approval of Wills of Indian testators after their death and the execution of Wills during their lifetime are as follows:

§ 15.1 'Administration of estates.' The heirs of Indians who die intestate possessed of trust or restricted property shall be determined by examiners of inheritance except as otherwise provided in the regulations in this part. The wills of deceased Indians disposing of trust or restricted property shall be approved or disapproved by examiners of inheritance except as otherwise provided in the regulations in this part. Claims against the estates of Indians shall be allowed or disallowed by examiners of inheritance in accordance with the regulations in this part.

§ 15.2 'Notice of hearings.' Hearings to determine the heirs of deceased Indians or to probate their wills shall be conducted only after notice of the time and place of such hearings shall have been posted for 20 days in five or more conspicuous places on the reservation of which the decedent was a resident or, if the decedent was not a resident of a reservation, in five or more conspicuous places in the vicinity of the proposed place of hearing.

§ 15.3 'Contents of notice.' The notice shall state that the examiner of inheritance, will at the time and place specified therein, take testimony to determine the heirs of the deceased Indian (naming him) and, if a will is offered for probate, testimony as to the validity of such will. The notice shall list the presumptive heirs of the decedent, and if a will is offered for probate, the beneficiaries under such will and the attesting witnesses to the will. The notice shall cite the regulations in this part as the source of the legal authority and jurisdiction for the holding of the hearing. \* \* \*

§ 15.12 'Wills, validity attested.' No action shall be taken on the will of a deceased Indian until testimony shall have been taken as to the testamentary capacity of the decedent to execute the will and as to the circumstances surrounding its execution. A reasonable effort shall be made to procure the testimony of the attesting witnesses to the will; or, if their testimony is not reasonably available, an effort shall be made to identify their signatures through other evidence.

§ 15.15 'Decision.' The Examiner of Inheritance shall, except as provided in § 15.21, decide the issues of fact and law involved in the proceeding and shall incorporate his findings and conclusions in a decision. Every decision determining the heirs of an Indian who died intestate shall cite the law of descent and distribution in accordance with which the decision was made. Every decision approving the will of an Indian shall state the devisees and legatees who take under the will and the particular property which

each is to receive, and shall construe any ambiguous provision of the will. Every decision shall state those claims against the estate which are allowed and those claims which are disallowed. A copy of the decision shall be mailed to each person who is found by the Examiner to be entitled to share in the estate, to each person whose claim to share in the estate was considered and denied by the Examiner, and to the Superintendent.

§ 15.21 'Escheat'. When the record in any estate indicates that an Indian has died intestate without heirs, the record shall be transmitted to the Secretary for decision.

§ 15.28 'Making, approval as to form, and revocation of wills.' (a) An Indian of the age of 21 years and of testamentary capacity, who has any right, title, or interest in trust or restricted property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses.

(b) Where a will has been executed and filed with the superintendent during the lifetime of the testator, the will shall be forwarded by the superintendent to the examiner of inheritance, who shall pass on the form of the will and then return it to the superintendent with appropriate instructions. A will shall be held in absolute confidence, and its contents shall not be divulged prior to the death of the testator.

(c) The testator may, at any time during his lifetime, revoke his will by a subsequent will or other writing executed with the same

formalities as are required in the case of destroying the will with the intention of revoking it. No will that is subject to the regulations of this part shall be deemed to be evoked by operation of the law of any State.

## APPENDIX B

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON

May 10, 1941

MEMORANDUM for the Assistant Secretary.

The attached letter to the Secretary, dated April 28, recommended disapproval of the will of William Smith, deceased Nez Perce Allottee No. 157 of the Northern Idaho Agency. The only reason given for disapproval of the will is that the will 'does not conform with Secretary's Order No. 420, dated August 14, 1933, prohibiting, except under certain circumstances, the alienation of Indian lands and the issuance of patent in fee.' That order forbids, with certain exceptions, the sale of restricted or Indian trust lands and the removal of restrictions from such lands by issuance of certificates of competency, patents in fee, or orders removing restrictions. It has no application to testamentary disposals of Indian property.

The record shows that the testator was of sound and disposing mind at the time of the execution of his will. No evidence whatever of fraud, duress, undue influence or other imposition is contained in the record. The testator devised certain inherited interests having a value of about \$900 to Louie J. Grende, a white man. Specific devises were also made to Matilda Fleet, a Spokane Indian, and Maud Jennings, half-sister and closest living relative of the testator who is also made sole residuary

devisee and legatee. In a written statement made contemporaneously with the will, the testator was careful to explain his reasons for these dispositions. According to that statement the devise to Grende was made because Grende had provided him with a home and had taken good care of him. The devise to Matilda Fleet was made because the subject of the devise was the allotment of Matilda's father and Matilda already had an interest in it. The devise to Maud was made because he wanted her to have all of his inherited interest on the Coeur d'Alene Reservation. If the will be disapproved, all of these stated desires of the testator will be defeated. Matilda who is not a heir will take nothing. Grende, the white man, would likewise take nothing as an heir but in recognition of services rendered to him by the decedent it is proposed to allow a claim in his behalf against the estate in the amount of \$600. Maud, while an heir, would have to share the land interests intended to be given her with others. Finally, five people not intended to be objects of the testator's bounty would be given a one-tenth interest each in the entire estate.

The act of June 25, 1910 (36 Stat. 856), as amended, declares that any person having restricted lands or other restricted or trust property, 'shall have the right \*\*\* to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior' with the proviso that no such will shall have any validity unless approved by the Secretary. The right to make a will is thus conferred on the Indian not on the Secretary. What-

ever discretion the Secretary may have in the matter of approving or disapproving the will, it is clear that this discretion should not be exercised to the extent of substituting his will for that of the testator. Such would clearly be the effect of disapproval in the present case. The naming of a non-Indian as one of the beneficiaries obviously is not a valid objection to approval of the will in the absence of fraud or other imposition, which clearly is not present.

I recommend that the will be approved.

For the Solicitor,

/s/ W. H. Flanery,  
Chief of Division.

Approved and referred to the  
Commissioner of Indian Affairs: May 12, 1941

/s/ Oscar L. Chapman  
Assistant Secretary.

DEC 23 1969

JOHN E. DAVIS, CLERK

In the  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1969

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**No. 300**

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JAMES TOOAHIMPAH TATE, VILA TOOAHNIPPAH (PADDLETY),  
JULIA TOOAHNIPPAH (GOOMBI), and JAMES TOOAHIMPAH  
TATE, the duly qualified and acting Administrator of the  
Estate of Frankie Lee Tooanippah, deceased,  
*Petitioners,*

VERSUS

WALTER J. HICKEL, Secretary of the Interior for the  
United States, and DORITA HIGH HORSE,  
*Respondents.*

---

**ANSWER BRIEF OF DORITA HIGH HORSE,  
RESPONDENT**

---

HOUSTON BUS HILL  
1376 First National Building  
Oklahoma City, Oklahoma 73102  
*Counsel for Respondent, Dorita High  
Horse*

December, 1969



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In the  
Supreme Court of the United States

OCTOBER TERM, 1969

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No. 300

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---

**ANSWER BRIEF OF DORITA HIGH HORSE,  
RESPONDENT**

---

**CITATIONS TO OPINIONS BELOW**

The opinion of the District Court for the Western District of Oklahoma (App. 27-37) is reported at 277 F.Supp. 464 (1967).

The opinion of the Court of Appeals for the Tenth Circuit vacating judgment of the trial court with direction to dismiss the action for want of jurisdiction is reported at 407 F.2d 394 (App. 44-47).\*

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\*A joint appendix containing the pleadings and orders of the Court has been prepared in accordance with Rule 36 for use in No. 300 and references to that appendix will be cited as App. ....

## **QUESTIONS PRESENTED FOR REVIEW**

1. Is a decision of the Secretary of Interior approving or disapproving a will of an Indian made pursuant to 25 U.S.C. Sec. 373, subject to judicial review under 5 U.S.C. Sec. 702 and 28 U.S.C. Sec. 1361. Or, to the contrary, does 5 U.S.C. Sec. 701(a) make such decision immune to judicial review?

2. Even if the decision is subject to review, is the scope of judicial review limited to determining whether or not the Secretary has remained within the scope of the authority conferred upon him?

3. If the scope of the review is larger, was the disapproval of the will under the facts of this case capricious and arbitrary, or did it have some rational basis?

## **STATUTES INVOLVED**

Title 5 U.S.C. Sec. 701(a):

### **"Application**

"This chapter applies according to the provisions thereof, except to the extent that . . .

(1) Statutes preclude judicial review; or

(2) Agency action is committed to agency discretion by law."

Title 5 U.S.C. § 702:

### **"Right of Review**

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Title 28 U.S.C. § 1361:

"Action to compel an officer of the United States to perform his duty

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Title 25 U.S.C. § 372:

"Ascertainment of heirs of deceased allottees; settlement of estates; sale of lands; deposit of Indian moneys

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: \* \* \*

Title 25 U.S.C. § 373:

"Disposal by will of allotments held under trust

"Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period,

and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless or until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: \* \* \*."

Title 25 U.S.C. Sec. 371:

"Descent of Land

"For the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of Section 348 of this title, whenever any male and female Indian shall have cohabited together as man and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purposes aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purposes be taken and deemed to be the legitimate issue of the father of such child: . . ."

## STATEMENT OF THE CASE

George Chahsenah was a full-blood Comanche Un-allottee and lived in and around Apache, Oklahoma, most of his life. He began drinking alcohol, whiskey and wine excessively during the early part of the 1940's and by 1956 was known as an "alcoholic" and an "habitual drunkard." Hardly a day passed that he was not drunk or drinking and this condition continued up until his death on or about October 11, 1963. George Chahsenah was also a diabetic, suffered from cirrhosis of the liver and was in and out of the Indian Hospital at Lawton, Oklahoma, as an alcoholic and diabetic. He was arrested many times in Apache, Lawton and Anadarko and thrown in jail for being drunk.

George Chahsenah never made any effort to work or earn wages during his lifetime but lived principally from the income from the leasing of his restricted lands for oil and gas and agricultural purposes. These funds were usually spent within a few hours or days after he received the money from the Bureau of Indian Affairs, for intoxicants and for personal items, such as food stuff and goods. Often this food and other goods would be traded for intoxicants during periods of temporary financial adversity. In order to purchase intoxicants during such periods, he often obtained money from relatives or other associates, several of whom were named as devisees in his various purported Wills and repaid such loans when funds were subsequently received.

During George Chahsenah's lifetime, he failed to make any appreciable efforts towards discharging his responsibility to his daughter, Dorita High Horse, during her childhood.

George Chahsenah was known as a "Will writer," having made several Wills, the first of which was on November 27, 1956, in favor of a niece, Viola Atewooftakewa (Tate); a second, dated March 19, 1957, in favor of a friend, Sammy Schwartzer; a third, dated May 21, 1959, in favor of a friend, Fred H. Bengé; a fourth, in favor of a nephew, Strudwick Tahsequah; a fifth, dated March 6, 1962, in favor of a cousin, Rosa May Wahah Roskah; and the last, dated March 14, 1963, in favor of his niece, Viola Atewooftakewa and her three children. None of these Wills contained a reference to Dorita High Horse, daughter of decedent.

After the judgment and opinion came down by the trial court, the principal beneficiary under the Will, Viola Atewooftakewa (Tate), the niece of George Chahsenah, deceased, died and the case was revived in the name of James Tooahimpah (Tate), no relation to George Chahsenah, but the father of George Chahsenah's grandnieces and grandnephews who were named as beneficiaries in his last purported Will, dated March 14, 1963. Another devisee, Frankie Lee Tooahimpah, is also deceased, and the action is revived in the name of James Tate, his father.

On or about the time that George Chahsenah made his last purported Will of March 14, 1963, he was staying part-time at the home of Viola Atewooftakewa (Tate) in Apache. He was drinking during said entire time that he was in and around his niece and her children.

At the time that George Chahsenah died on October 11, 1963, apparently by virtue of his chronic alcoholism and his illness through diabetes and cirrhosis of the liver, he was in the Indian Hospital at Lawton, Oklahoma. George

Chahsenah was 55 years of age, at the time of his death, a resident of Apache, Oklahoma, having never married and leaving no surviving brothers, sisters or parents. He was survived by several nieces and nephews, most of whom were Appellants on the appeal before the Secretary of Interior and by his daughter, Dorita High Horse, an Appellant before the Secretary of Interior and defendant and Intervenor in the trial court. The paternity of Dorita High Horse had been acknowledged by George Chahsenah during his lifetime on several occasions and caused the Secretary of Interior, acting by and through the Solicitor, to state:

“Evidence supporting the Examiner’s finding of fact that Dorita High Horse is decedent’s daughter is virtually uncontradicted in the record and is so convincing that his finding would be sustained on appeal if it had been contested, and it was not.”

It will be noted in passing that much of Petitioners’ statement of the case is argumentative and inappropriate to that section of their brief. Respondent objects strenuously to the constant characterization of her as being an illegitimate, as she is legitimate by the very terms of Title 23 U.S. 371.

This Statute was applied to Dorita High Horse by the Examiner of Inheritance (App. 71-72) under its Statutes at Large designation of an Act of February 28, 1891, 26 Statute 795.

## SUMMARY OF ARGUMENT

In Petitioners' summary of argument reference is made to prior decisions by the Secretary of Interior, in which the Secretary approved Wills that did not achieve or consummate an equitable treatment of the heirs-at-law of the decedent Indian, and specifically mentioned the *Estate of Wook-Kah-Nah*, 65 ID 436, and later affirmed by the Circuit Court of Appeals of the District of Columbia in *Ase-nap v. Huff*, 312 F.2d 358. Counsel for Respondent, Dorita High Horse herein, represented the principal beneficiaries under the Will of Wook-Kah-Nah and defended the contest thereto before the Examiner and before the Secretary of Interior.

Contrary to Petitioners' contention that equitable treatment of the heirs-at-law of the decedent, Wook-Kah-Nah, was not mentioned, it is pointed out that the Protestants to the Wook-Kah-Nah's Will made an issue of this point. However, since there was ample evidence to satisfy the Examiner and the Secretary of the Interior that Wook-Kah-Nah had adequately and equitably taken care of her other children, neither dignified the issue by relying solely on the point for an approval of her Will.

Respondent, Dorita High Horse, the heir of the testator, contends that the action of the Secretary of Interior in disapproving the Will should be sustained by this Court.

It is the Respondent's contention that action taken by the Secretary pursuant to 25 U.S.C. Sec. 373 is not reviewable by the courts. This section should be read together with 25 U.S.C. Sec. 372, dealing with the determination of heirs. When this is done the language in the latter section making action by the Secretary "final" is equally applica-

ble to the Secretary's act in approving or disapproving a Will. The two sections, of necessity, should be read together because they are two halves of a unified Congressional plan to entrust the passage of an Indian's restricted property on that Indian's death to the administrative discretion of the Secretary, rather than to the courts. The legislative history and previous decisions of this Court are consonant with this contention.

Because the Secretary's act is thus final, it falls under 5 U.S.C. Sec. 701(a) which makes the Secretary's act immune to judicial review.

If, however, it should be determined that the Secretary's act is subject to review, the scope of review is limited to determining if the act was within the scope of authority conferred upon him. There is no suggestion that it is beyond the power of the Secretary to disapprove a Will of a restricted Indian as to that Indian's restricted property.

Further, however, if it should be determined that the scope of review is not thus limited, it is suggested that, nevertheless, the Secretary's action should be sustained. His decision has a rational basis. It is not capricious or arbitrary. Under these circumstances a judicial reversal of the Secretary's act would be tantamount to usurpation of discretion bestowed upon Secretary and not on the courts.

Finally, it is submitted that 28 U.S.C. Sec. 1361 is not applicable. It merely extended the jurisdiction over mandamus to the local federal courts. It did not expand the scope of the remedy. Mandamus will lie only to require an official to do a ministerial act or to exercise his discretion. It will not lie to correct action taken by an official which lies within his discretion.

## ARGUMENT

### I

**THE LEGISLATIVE HISTORY AND PREVIOUS DECISIONS OF THIS COURT ARE CONSISTENT WITH THE HOLDING THAT THE SECRETARY'S ACTION IS NOT SUBJECT TO REVIEW BY THE COURTS.**

The power of the Secretary to approve or disapprove the Wills of Indians as to restricted property now 25 U.S.C. § 373 came into the law in June 25, 1910, ch. 431, § 2, 36 Stat. 856:

*"Any persons of the age of twenty-one years having any right, title or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior."* (Emphasis ours.)

The Act of February 14, 1913, 37 Stat. 678, as amended, 25 U.S.C. § 373 additionally provides:

*"\* \* \* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in any case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary is authorized within one year after the death of the testator to can-*

cel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State whereir the property is located \* \* \*." (Emphasis ours.)

In 45 Cong. Rec. 5812 we find recorded this discussion of the above legislation between Mr. Burke, the Chairman of the Indian Affairs Committee of the House and Representative Tilson:

"Mr. Tilson. May I ask the gentleman as to the last provision of section 2, as to when the approval of the Commissioner of Indian Affairs or the Secretary of the Interior is to be given to this will—when it is made—before the testator dies?

Mr. Burke of South Dakota. It would not have any effect if it was not completed in the lifetime of the decedent, I would imagine.

Mr. Tilson. My question goes to this: Could this will, if it were made and the Indian should die, be sent to the Secretary of the Interior to be approved then?

Mr. Burke of South Dakota. Possibly it might. I think perhaps it would be just as well if it could.

Mr. Cox of Indiana. Mr. Chairman, what is the gentleman's opinion as to whether or not the proviso contained in section 2 does not place the complete power of the will in the hands of the Commissioner of Indian Affairs?

Mr. Burke of South Dakota. The Commissioner of Indian Affairs and the Secretary of the Interior, of course, would not favor the provision permitting Indians to make wills unless the making of them were subject to the approval of the department.

Mr. Cox of Indiana. Under the proviso as it now exists in section 2, does it not place complete power in the hands of the Secretary of the Interior and the Commissioner of Indian Affairs over the will of an Indian with absolute power to revoke the Indian's will?

Mr. Burke of South Dakota. I think so.

Mr. Cox of Indiana. Then after all it simply imposes the entire power of making the will in the hands of the Commissioner of Indian Affairs.

Mr. Burke of South Dakota. I will say the purpose was this: It frequently happened—and I will speak of that in connection with sections 3 and 4 at the same time—it frequently happened an Indian has three or four children. He was allotted land at the time he had only two children, and the father and the mother have allotments and the two children who were living at the time allotments were made have allotments, but the other children have no land at all.

Now, the Indian is just as human as a white man, and it frequently happens that he desires to have permission to give his allotment to the children who have no land, and in a case of that kind undoubtedly the Interior Department would O.K. it, whereas if it was a will giving his estate to some person who ought not to have it, then they would disapprove it.

Mr. Cox of Indiana. I suppose the purpose of this proviso is an equitable purpose, reserving in the Department of the Interior the power to compel the Indian to make a proper will—

Mr. Burke of South Dakota. Not compel him at all.

Mr. Cox of Indiana. Or else revoke the will if he did not make a proper will.

Mr. Burke of South Dakota. If the Indian makes a will, and it is not satisfactory to the commissioner and the Secretary, and I put both in to safeguard it, it will be disapproved of, and of course will be of no effect.

Mr. Cox of Indiana. Then, if the will does not meet the approval of the Commissioner of Indian Affairs and the Secretary of the Interior, it gives them power to revoke it.

Mr. Burke of South Dakota. No; it can not be revoked until approved, at least. Section 3 provides that where an Indian has an allotment he may release his allotment and let the land be allotted to his children who are without any land, subject to the approval of the Secretary of the Interior."

Until this legislation was passed a restricted Indian could not make a Will of his restricted property. In speaking of this legislation, admittedly more particularly of § 1 of the Act now 25 U.S.C. § 372, the Supreme Court said:

"In so doing, it evinces a change of policy, and an opinion that *the rights of Indians can be better preserved by the quasi paternalistic supervision of the general head of Indian Affairs.*" *Hollowell v. Commons*, 239 U.S. 506, 508.

Under the provisions of the foregoing Act, a Comanche Indian was granted the right to dispose of his trust property by Will, in accordance with the regulations prescribed by the Secretary of the Interior. It will be noted that under the provisions of the section above quoted that no Will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior. Further, that the Secretary of the Interior may

approve or disapprove the Will either before or after the death of the testator.

The leading case in construing the foregoing Federal Act is *Blanset v. Cardin*, 256 U.S. 319 (1921). In said decision, the Supreme Court used the following language beginning at page 326:

"The act of Congress is careful of conditions. In the first instance it is concerned with testacy; that is, the existence of a will. A will existing, the allotment is disposed of by it. A will not existing—either not execute, or, if executed, canceled—there is intestacy, and the state laws of descent and distribution obtain. In the present case, there is a will and it is uncanceled; and, therefore, the contention of appellant is untenable. And it will be observed also by referring to the Act of Congress, powers are invested in the Secretary which preclude interference or control by anybody, or right in anybody to have canceled 'the patent in fee' which is empowered 'to be issued to the devisee or devisees,'—a right appellant asserts in the present case. In a word, the Act of Congress is complete in its control and administration of the allotment and of all that is connected with or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under the Oklahoma Code. And we agree with the court of appeals that the Act of Congress was the prompting of prudence to '*afford protection to dependent and natural heirs against the waste of the estate as the result of an unfortunate marriage, and enforced inheritance by state law.*' And there can be no doubt that the Act was the suggestion of the Interior Department, and its construction is an assistant, if not demonstrative criterion, of the meaning and purpose of the Act.

"Our conclusion is the same as that of the court of appeals, 'that it was the intention of Congress that this class of Indian should have the right to dispose of property by will under this Act of Congress, free from restrictions on the part of the state as to the portions to be conveyed, or as to the objects of the testator's bounty; *provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior.*' The court added that the conclusion was in accord with the views of the Supreme Court of the State, referring to *Brock v. Keifer*, 59 Okla. 5, 157 Pac. 88." (Emphasis ours.)

In light of this legislative history and these previous expressions by this Court, it is submitted that the view, that disapproval of the Will is not subject to judicial review, taken by the Court for the Tenth Circuit is sound.

It is submitted that this history and these decisions also demonstrate the unsoundness of the position taken by the legatees and devisees. They suggest (Petitioners' Brief 20-30) that the Secretary is limited to determining whether the Will was executed with due formalities, whether the Will was free of taint of duress and undue influence, and whether the testator had testamentary capacity. Certainly, this history and the language of the Court set out above demonstrate forcibly that the legislation was not intended to limit the Secretary to serving the same function that a probate court serves in relation to ordinary Wills. If this had been the intent of Congress, it seems unlikely that it would have taken restricted Indian Wills away from the courts where they had been prior to the Act. *Hallowell v. Commons*, 239 U.S. 506.

The legatees and devisees of the Will urge strongly the applicability of the presumption against non-reviewability (Petitioners' Brief 41-50).

In answering this argument, counsel for Dorita High Horse can do no better than set out a portion of the opinion of Chief Justice Jameson of the United States District Court for Montana in *Simons v. Udall*, 276 F.Supp. 75, 76:

"Section 1 [25 U.S.C. § 373] relating to ascertainment of the legal heirs of the decedent contains the language 'and his (the Secretary's) decision thereon shall be final and conclusive.' In many cases it has been held that decisions of the Secretary made pursuant to Section 1 are not reviewable. There is a conflict in the authorities as to whether the same finality extends to decisions of the Secretary under section 2 [25 U.S.C. § 373]. In the consideration of these cases, it is important at the outset to recognize the plenary power of Congress over Indians and Indian property. This power was well-summarized in an opinion by Judge Pope in *Simmons v. Eagle Seelatsee*, E.D.Wash.1965, 244 F. Supp. 808, 813; *aff'd* without opinion, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480. The court said in pertinent part:

'It is well settled that Congress has plenary control over Indian tribal relations and property and that this power continues after the Indians are made citizens. (citing cases) "After 1871 Congress turned from regulating Indian affairs by treaty to regulation by agreement and legislation. The plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions." Board of County Com'rs of Creek County v. Seber, 318 U.S. 705, 716, 63 S.Ct. 920, 926, 87 L.Ed. 1094.'

\* \* \* "Plenary authority over the tribal relations of the Indians has been exercised by Congress from

the beginning and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. *Lone Wolf v. Hitchcock*, 187 U.S. (553) 565. (23 S.Ct. 216, 47 L.Ed. 299).”

“A leading case on the effect and purpose of the Act of June 25, 1910, is *Hallowell v. Commons*, 239 U.S. 506, 508, 36 S.Ct. 202, 60 L.Ed. 409, which involved the equitable title of alleged heirs of an Indian allottee dying intestate during the trust period. It was argued that the Act should not apply to pending cases. The language of the Court in answering this contention (although related specifically to section 1 of the Act) is pertinent. The Court said in part:

“ \* \* \* This act restored to the Secretary the power that had been taken from him by acts of 1894 [28 Stat. at L. 305, chap. 290] and February 6, 1901, chap. 217, 31 Stat. at L. 760, Comp.Stat. 1913, § 4214. *McKay v. Kalyton*, 204 U.S. 458, 468, 27 Sup.Ct.Rep. 346, 51 L.Ed. 566, 570. It made his jurisdiction exclusive in terms, it made no exception for pending litigation, but purported to be universal, and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States. \* \* \*

But, apart from a question that we have passed whether the plaintiff even attempted to rely upon the statutes giving jurisdiction to the courts in allotment cases, the reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds, takes away no substantive right, but simply changes the tribunal that is to hear the case.”

“There is some conflict in the few cases which have passed upon the reviewability of decisions of the Secretary under section 2 [25 U.S.C. § 373] of the 1910 Act. In the case of *Homovich v. Chapman*, 1951, 89 U.S.App. D.C. 150, 191 F.2d 761, the court held that review is not precluded by the statute, saying in part:

\* \* \* We think it plain that, if Congress had meant that the decisions in Section 2 should be final and conclusive, it would have said so; in the immediately preceding paragraph it had so provided when it meant to do so. The mere fact that the acts of the Secretary in providing regulations for the execution of these wills and in approving them, required the exercise of discretion and judgment on his part, does not preclude judicial review of his action. To be sure, if upon such review it appears that his action was within the scope of the authority conferred upon him, the court cannot disturb his decision. But that is a different rule from the rule of total non-reviewability. The Administrative Procedure Act (Section 10) forbids judicial review only where statutes "preclude" such review or where agency action is "by law committed to agency discretion." No statute "precludes" this review, and the Secretary would have us stretch the second prohibitory clause far beyond its meaning. \* \* \*

"In *Hayes v. Seaton*, 1959, 106 U.S.App. D.C. 126, 270 F.2d 319, the primary question for determination was whether a father or son died first. If the father died first, the property passed to the son under his will. If the son died first, the father inherited his son's property by intestate succession. The court held the Secretary's determination that the son survived the father was 'final and conclusive' under Section 1 of the 1910 Act [25 U.S.C. § 372], and that there was 'no basis for \* \* \* reliance on § 2' [25 U.S.C. § 373] of the act. In a dissenting opinion, Judge Burger took the position that both Sections 1 and 2 had equal bearing, and that the action of the Secretary was reviewable in view of the holding in *Homovich v. Chapman* that 'Section 10 of the Administrative Procedure Act governs review of action taken by the Secretary under the authority of Section 2 of the 1910 Act.'

"In the recent case of *Heffelman v. Udall*, 1967, 10 Cir., 378 F.2d 109, 112, cert. den. Nov. 7, 1967, 389 U.S. 926, 88 S.Ct. 287, 19 L.Ed.2d 278, the Court of Appeals for the Tenth Circuit declined to follow *Homovich v. Chapman*. On the contrary, the court said that it would be 'illogical and contrary to the whole history of laws governing Indian property' to distinguish between the rights of heirs under section 1 and legatees and devisees under section 2. In that case the will provided that if the deceased remarried, one-third of her estate was to go to her husband. The question determined by the Secretary was whether or not a marriage had taken place. The court said in part:

"\* \* \* Rather, we are urged to hold that the absence or presence of a will is the determinative premise upon which jurisdiction to review the Secretary's finding of a question of fact is dependent. To so hold, we believe, would reduce "the act of Congress [the Act of June 25, 1910] \* \* \* to impotence by its contradictions." *Blanset v. Cardin*, 256 U.S. 319, 325, 41 S.Ct. 519, 522, 65 L.Ed. 950. Certainly, if Louise Wilson had died intestate, the rejection of appellant's claim to heirship and the Secretary's finding would not be subject to judicial review. *Henrietta First Moon v. Starling White Tail*, 270 U.S. 243, 46 S.Ct. 246, 70 L.Ed. 565. While there may be legal distinctions to be drawn between the claim of an heir and the claim of a legatee, it would be illogical and contrary to the whole history of laws governing Indian property to ascribe to Congress by way of a negative inference an intention to provide the Secretary of the Interior with unfettered discretion on the one hand but not on the other. We think that as long as an Indian allotment remains subject to the Secretary's control, cf. *Hanson v. Hoffman*, 10 Cir., 113 F.2d 780, sections 1 and 2 of the Act of 1910 should be viewed as complementing each

other with respect to the finality of the administrative determination of facts. We accordingly conclude that such a determination comes within the jurisdictional exception stated in section 10 of the Administrative Procedure Act.' 378 F.2d 112.

"The reasoning in the Heffelman case is persuasive, particularly in view of the history of the laws governing Indian property. Section 1 [25 U.S.C. § 372] of the 1910 Act provides that when an Indian allottee dies before the expiration of the trust period 'without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior \* \* \* shall ascertain the legal heirs \* \* \* and his decision thereon shall be final and conclusive.' Section 2 [25 U.S.C. § 373] then provides that an allottee over 21 years of age may dispose of his property by will 'in accordance with regulations to be prescribed by the Secretary of the Interior; Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior \* \* \*.'

"Under both sections the Secretary 'in his discretion' is empowered to sell the restricted land and to remove restrictions and issue a fee patent to heirs or devisees. As the court said in *Hanson v. Hoffman*, supra, 'until the administrative control of the Secretary over the allotments and the trust property has ceased, the courts are without power to interfere with the performance by the Secretary of his Administrative functions with respect thereto.'

"Bearing in mind also the plenary control by Congress over Indian property and that the effect of the 1910 Act, as stated by Mr. Justice Holmes in *Hallowell v. Commons*, supra, was to restore to the Secretary 'the power that had been taken from him' by prior acts, it is my conclusion that sections 1 and 2 of the 1910 Act should be construed together and that the decision of

the Secretary is not reviewable under either section. This construction is consistent with the apparent intent of Congress to insure marketability of Indian titles.

"This conclusion finds support in the legislative history of the 1910 Act, as indicated by the following excerpt from the proceedings on H.R. 24992:

'Mr. Fitzgerald. Mr. Chairman, I want to call the gentlemen's attention there to section 1, where it provides that the determination of the Secretary of the Interior as to who the heirs of any Indian are is conclusive.

'Mr. Burke of South Dakota. I will say to the gentlemen that that is in the law of 1906 and was put in the law of 1908. It was put in there for this purpose. *It was to settle title, so that its finality could never be questioned* for the purpose of affecting its marketability. It simply leaves any aggrieved person who may be left out in the distribution of an estate a claim to go to Congress, instead of assailing the title.

'Mr. Fitzgerald. Would it not be better to give some remedy in the court; have a court determine as to who the heirs of any Indian might be?

'Mr. Burke of South Dakota. My observation has caused me to believe that it is not a desirable method of determining titles \* \* \*.' 45 Cong.Rec. 5811-12 (May 4, 1910). Emphasis added.

"I am not unmindful of the provision of the Administrative Procedures Act, 5 U.S.C. § 702, that '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute' is entitled to judicial review, 'except to the extent that—(1) statutes preclude judicial review; or (2) agency action is

by law committed to agency discretion.' 5 U.S.C. § 701(a) (recodified in Pub.Law 89-554, 80 Stat. 378). It is now well-settled that 'judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' *Abbott Laboratories v. Gardner*, 1967, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681." [Footnotes omitted.]

Subsequent to this opinion by Justice Jameson, the Tenth Circuit decided *Attocknie v. Udall*, 390 F.2d 636, cert. denied 393 U.S. 833, relying on the *Heffleman* case, *supra*, and its theory that Sections 1 and 2 of the Act of 1910, 25 U.S.C. Sections 372 and 373 were to be read as complementing each other.

Section 10 of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. Sec. 1009, confers the right of review "Except so far as \* \* \* (2) agency action is by law committed to agency discretion."

The action of the Secretary of Interior in approving a Will obviously involves discretion. Sec. 2 of the Act of June 25, 1910, as amended by the Act of February 14, 1913, 37 Stat. 678, 25 U.S.C. Sec. 373, after providing that no Will shall be valid unless and until it has been approved by the Secretary, gives wide powers to that officer (a) to approve or disapprove a Will before or after death, (b) to revoke an approval for fraud, (c) to continue to administer the trust, even after death and approval of the Will, (d) in that event to cause the lands to be sold and the money used, as necessary, for the heirs, or (e) remove the restrictions, or (f) cause a patent in fee to be issued to the devisees, or (g) pay the moneys to the legatees "in whole or in part from time

to time as he may deem advisable, or use it for their benefit." (Italics ours.)

The mere enumeration of these alternative powers shows they are discretionary; no rules chart the Secretary's course; no Congressional plan ties his hands; he decides according to his own good sense. Sec. 2 even gives him power to make regulations, which imports discretion.

## II

**EVEN IF THE SECRETARY'S ACTION IS SUBJECT TO JUDICIAL REVIEW, THE SCOPE OF THAT REVIEW IS LIMITED TO THE DETERMINATION BY THE COURTS AS TO WHETHER THAT ACTION IS WITHIN THE SCOPE OF THE AUTHORITY CONFERRED UPON HIM.**

The devisees and legatees rely strongly on *Homovich v. Chapman*, 191 F.2d 761, in which counsel for Dorita High Horse represented the legatees and devisees under the Homovich Will. Therein the Court of Appeals for the District of Columbia said:

*"To be sure, if upon such review it appears that his action was within the scope of the authority conferred upon him, the Court cannot disturb his decision. But that is a different rule from the rule of total 'non-reviewability.'"* Id. at 764. (Emphasis ours.)

What is the scope of the power conferred on the Secretary? A reading of the statute, 25 U.S.C. Sec. 373 will demonstrate that he was authorized to make regulations concerning the Wills by which restricted Indians might dispose of their property. Then in a proviso, he is delegated the authority to approve Wills. It is submitted that this authority transcends the power to check the Will for com-

pliance with the formalities prescribed by the regulations. The proviso says, "no will so executed," i.e., in compliance with the regulations adopted, "shall be valid or have any force or effect unless it shall have been approved by the Secretary."

No one has suggested any reason why the action of the Secretary should be viewed as being outside the scope of the power granted to the Secretary. It is admitted that the Indian and property involved are restricted. There is no suggestion that the period of restriction has expired. How, then, does the action of the Secretary in disapproving the Will exceed the scope of his authority?

### III

**REGARDLESS OF THE DECISION AS TO REVIEWABILITY, AND THE LIMITED DEGREE OF REVIEW SUGGESTED ABOVE IN II, NEVERTHELESS THE ACTION OF THE SECRETARY MUST BE SUSTAINED BY THIS COURT BECAUSE THE DECISION OF THE SECRETARY WAS NOT CAPRICIOUS OR ARBITRARY, BUT HAD A RATIONAL BASIS. UNDER THESE CIRCUMSTANCES, THE SUBSTITUTION BY A COURT OF ITS JUDGMENT FOR THAT OF THE SECRETARY WOULD BE A USURPATION OF THE CONGRESSIONAL DELEGATION OF DISCRETION TO THE SECRETARY.**

The basic principle inhibiting a court's arrogation of agency action to itself was postulated by Justice Cardozo in *A. T. & T. Co. v. United States*, 299 U.S. 232, 236-237 (1936):

*"This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of*

action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or un-wisdom is not equivalent to abuse. \* \* \*

In other words, where Congress has delegated discretionary authority to the Secretary of Interior to approve or disapprove Wills of Indians, the substitution of judgment by the court for that of the Secretary is in derogation of the Congressional delegation and is an impermissible usurpation of administrative power. *Cf. Decatur v. Paulding*, 14 Pet. 497, 515-517 (1840); *Securities Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *id.* 332 U.S. 194, 207-209 (1947); *Gray v. Powell*, 314 U.S. 402, 411-413 (1941); *Federal Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145-146 (1940); *Crolley v. Tatton*, 249 F.2d 908, 911-912 (C.A. 5, 1957), *cert. den.* 356 U.S. 966.

So, here, it is the Secretary's judgment, not that of the courts, whether to approve or disapprove the purported Last Will and Testament of George Chahsenah, deceased, Comanche Unallottee, on which Congress placed its reliance.

It is a cardinal rule of administrative law that administrative action, such as that of the Secretary in the instant case, should not be disturbed by the courts "when there is found to be a rational basis for the conclusions approved by the administrative body." *Hayes v. Seaton*, 270 F.2d 319, 321 (D.C. Cir. 1959). It was not the function of the courts to decide whether it would have reached a different conclusion under the facts of this case than was reached by the Secretary, but whether the Secretary's determination was a reasonable one.

*The decision of the Secretary to disapprove the Will does have a rational basis.*

The test employed by the Regional Solicitor acting for the Secretary in determining whether to approve or disapprove the Will was:

"The appropriate action to be taken in approving or disapproving the purported will is the action which would most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law."

It is submitted that this test is in keeping with the legislation which conferred power upon restricted Indians to devise their restricted property.

It should be recalled that this Court said of the legislation under examination that "(I)t evinces a change of policy that the rights of Indians can be better preserved by the quasi paternalistic supervision of the general head of the Indian Affairs." *Hallowell v. Commons*, 239 U.S. 506, 508.

Further, the facts of the case are such that measured by this test, the disapproval of the Will was rational. The Regional Solicitor speaking for the Secretary in refusing to approve the Will said:

"Since the record contains sufficient evidence of the relationship between the decedent and his heir-at-law and his devisees to ascertain whether approval of the will by the Hearing Examiner was an appropriate discharge of the Secretary's responsibility, consideration of the circumstances surrounding these persons will be given at this appellate level.

"The decedent was the natural father of Dorita High Horse. The record reflects that during his lifetime the decedent's only contribution toward the welfare of his daughter was to participate in her conception, to acknowledge her status as his daughter, and to visit briefly with her on rare occasions when they would by accident meet on public streets. Before the daughter's birth, he abandoned the mother, with whom he had been living. Although marriage to the mother was not impeded by any existing or subsequent marriage to another woman, the decedent neglected to remain and maintain a home with the mother in order that the daughter would have the advantages of a normal home life during her childhood. Notwithstanding the fact that the decedent received income from his restricted lands, he made no contribution toward the support or education of his daughter, leaving her to be supported by her mother, until she died when the daughter was six years old, and thereafter by a maternal aunt. The decedent's legal responsibility for the support of his daughter during her childhood could have been enforced by judicial action on her behalf to the extent, if any, that he had unrestricted income or assets, and the Secretary or his authorized representative probably would have honored reasonable requests on the daughter's behalf for contributions toward her support from the decedent's income from restricted lands. However, no action toward that end was taken by the decedent, by his daughter, or by others on her behalf.

"If the decedent had died several years earlier leaving an orphaned minor daughter being raised by an aunt, any will disinheriting the daughter would be subject to disapproval because the estate would be needed for discharging his responsibility for supporting the child. The fact that the daughter had attained majority and married prior to the death of the decedent does not alter the fact that the decedent had an obli-

gation to his daughter which was not discharged either during his lifetime or under the terms of his purported will. For this reason it is inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare by lending his approval to the decedent's will.

"This decedent failed to make any appreciable effort toward discharging his responsibilities to his daughter during her childhood, and upon her attaining adulthood he attempted by will to devise and bequeath to others such of his restricted assets as had not been dissipated. This he could do only if he possessed unrestricted power of testamentary disposition. His attempt to do so, however, was limited by the fact that the Secretary must exercise the discretionary responsibility of approving the will before it can become effective. Although the Examiner approved the will, this appeal from that approval requires the appellate authority to determine whether such approval was a reasonable exercise of the discretionary responsibility of the Secretary.

"I hereby determine, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2a(3) (a), 24 F.R. 1348) and redelegated to the Regional Solicitor (Solicitor's Regulation 23, 31 F.R. 4631), that under the circumstances hereinbefore set forth the Secretary's approval of the purported will dated March 14, 1963, should not be given, the Examiner's approval is rescinded, and the will is hereby disapproved" (App. 85-87).

Viola Atewooftakewa (Tate), the niece and principal beneficiary of George Chahsenah, has died since the disapproval of the Will, leaving grandnieces and grandnephews and their father, who is of no relation to Chahsenah. When the equity of their claim is weighed against that of the daughter, Dorita High Horse, the wisdom of

Congress giving discretion to the Secretary to approve or disapprove Wills of restricted Indians is readily apparent. Without this power, the restricted property would have passed to distant relatives and even one who was totally unrelated by blood. In some cases it might even pass to persons completely devoid of Indian blood. This is the very reason that Congress placed Indian Wills of restricted property under the paternalistic supervision and discretionary control of the Secretary of Interior.

It is, therefore, submitted that even if the Secretary's act is subject to judicial review in the ordinary sense and scope of review of administrative action, still his disapproval of the Will ought to be sustained.

#### IV

**THERE IS NO MERIT IN THE ARGUMENT THAT 28 U.S.C. SEC. 1361, WHICH AUTHORIZES LOCAL FEDERAL DISTRICT COURTS TO ENTERTAIN SUITS FOR MANDAMUS AGAINST FEDERAL OFFICIALS, CONFERRED JURISDICTION ON THE DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA TO OVERTURN THE SECRETARY'S ACTION.**

Title 28 U.S.C. Sec. 1361 does not increase the scope of the remedy of mandamus. Before the action will lie the duty must be ministerial or not discretionary and so plainly prescribed as to be free of doubt. *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F.2d 364, cert. denied 385 U.S. 831; *Seeback v. Cullen*, 224 F.Supp. 15, aff'd 338 F.2d 663, cert. denied 380 U.S. 972; *Rural Electrification Administration v. Northern States Power Co.*, 373 F.2d 686, cert. denied 387 U.S. 945; *Armstrong v. U. S.*, 223 F.Supp. 188, aff'd 354 F.2d 648, cert. denied 384 U.S. 946.

### CONCLUSIONS

For the foregoing reasons, it is respectfully requested that this Court affirm the judgment of the Court of Appeals for the Tenth Circuit which vacated the order of the trial court and remanded the case to the trial court for dismissal. It is further requested that this case be remanded to the Secretary of Interior with instructions to him to distribute the Estate of George Chahsenah, deceased, Comanche Unallottee, to Dorita High Horse as his sole heir.

Respectfully submitted,

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December, 1969



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# **In the Supreme Court of the United States**

OCTOBER TERM, 1969

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No. 300

JAMES TOOAHIMPAH TATE, ET AL., PETITIONERS

v.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR,  
AND DORITA HIGH HORSE

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT*

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## **BRIEF FOR THE SECRETARY**

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### **OPINIONS BELOW**

The opinion of the court of appeals (App. 44-47) is reported at 407 F. 2d 394. The opinion of the district court (App. 27-37) is reported at 277 F. Supp. 464. The administrative decision, which became the final order of the Secretary of the Interior (App. 82-87), is not reported.

### **JURISDICTION**

The judgment of the court of appeals was filed on March 3, 1969 (App. 49), and a petition for rehearing was denied on April 8, 1969 (App. 62). The petition

for a writ of certiorari was filed on June 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTIONS PRESENTED

1. Whether the Secretary of the Interior's disapproval of a will disposing of restricted Indian allotments is "final and conclusive" as stated in 25 U.S.C. 372.

2. Whether 25 U.S.C. 373 authorizes the Secretary to take equitable considerations into account in disapproving such a will.

#### STATUTE INVOLVED

The Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. 372, 373, provides: <sup>1</sup>

SEC. 1. When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be *final and conclusive*. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may in his discretion, cause such lands to be sold: \* \* \*  
[Emphasis supplied.]

<sup>1</sup> The Act is presented here, and referred to hereafter, in its current amended form, as it existed when the issues in this case arose. The amendments to the Act are not significant as regards the issues presented in this case.

SEC. 2. Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: *Provided further,* That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to

be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: *Provided also*, That this section and section 372 of this title shall not apply to the Five Civilized Tribes or the Osage Indians.

#### STATEMENT

George Chahsenah, a Comanche Indian, died leaving a restricted estate consisting of interests in three Comanche allotments (App. 72). Under a will dated March 14, 1963, George Chahsenah devised and bequeathed his estate to a niece and her three children, petitioners herein (App. 72). The will made no mention of the decedent's daughter, Dorita High Horse (App. 83).

Dorita High Horse and others contested the testamentary capacity of the decedent because of his history of prolonged excessive drinking (App. 71-75). After hearing conflicting evidence, the Bureau of Indian Affairs' hearing examiner approved the will, finding that the decedent was mentally competent when the will was made (App. 74-75). The examiner also found that Dorita High Horse was the illegitimate daughter of the decedent (App. 71). In departmental proceeding, that approval was rescinded and the will disapproved (App. 82-87). The Regional Solicitor, acting for the Secretary, found that the decedent had failed to discharge his responsibilities to his daughter during her childhood and that it would be "inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare by lending his approval to the decedent's will" (App. 86). Petitioners

then commenced this action, seeking to have the Secretary's decision set aside and the estate distributed in accordance with the terms of the will (App. 5). The judgment of the district court ordering the Secretary to approve the will (App. 38-39), was reversed by the court of appeals, with directions to dismiss for lack of jurisdiction on the ground that, under Section 2 of the 1910 Act, *supra*, the departmental decision was not subject to judicial re-examination (App. 44-47).

#### SUMMARY OF ARGUMENT

I. The Act of June 25, 1910, precludes review of the Secretary's approval or disapproval of a will disposing of allotted lands. The language of Section 1 of the Act, which explicitly states that the Secretary's determination as to the heirs of an intestate allottee is "final and conclusive," must be read as applicable to Section 2, which authorizes the Secretary to approve wills. This reading is compelled by the parallel provisions and close relationship between these two complementary provisions, and by the anomalous situations which could result if the same finding by the Secretary were reviewable with respect to Section 1 but not with respect to Section 2. The legislative history of the Act makes it clear that Congress thought it was authorizing the Secretary to make final, non-reviewable decisions under both Sections 1 and 2. This Court has already held that constitutional standards do not require that Congress provide review of the Secretary's determinations in this area.

II. Even if the Act had not precluded review of the Secretary's disapproval of a will, the Secretary's decision in this case could only be reversed if it were found that the Secretary acted beyond the scope of his authority. Petitioners' contention that the Secretary exceeded his authority by taking into account equitable considerations is erroneous. The legislative history of the Act shows that Congress intended the Secretary to decide whether a will equitably disposes of restricted property, and this duty is entirely consistent with the Secretary's fiduciary role with respect to restricted Indian allotments.

#### ARGUMENT

##### I. THE 1910 ACT PRECLUDES REVIEW OF THE SECRETARY'S REFUSAL TO APPROVE A WILL DISPOSING OF ALLOTTED LANDS

The decision below rests, in part, upon the explicit authority and responsibility of the Secretary of the Interior to supervise the disposition of restricted Indian property (allotments) upon the death of the Indian allottees, pursuant to the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. 372, 373.<sup>2</sup> Section

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<sup>2</sup>"An Act to provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes." Prior to the passage of the Act of August 15, 1894, 28 Stat. 286, the sole authority for settling disputes concerning allotments, including those regarding inheritance, rested with the Secretary of the the Interior. *McKay v. Kalyton*, 204 U.S. 458, 468. The 1910 Act restored to the Secretary the power to determine legal heirs, which had been taken from him by the 1894 Act and the Act of February 6, 1901, 31 Stat. 760. *Hallowell v. Commons*, 239 U.S. 506, 508.

1 of the Act authorizes the Secretary to "ascertain the legal heirs" of an Indian decedent who dies intestate, and specifies that the Secretary's "decision thereon shall be final and conclusive." This Court has recognized as settled that the courts are without jurisdiction to review the Secretary's decisions as to heirs, even when a misapplication of law is alleged. *First Moon v. White Tail*, 270 U.S. 243, 244.<sup>3</sup> In interpreting Section 1 of the Act to preclude judicial review of the Secretary's determination of the legal heirs of an allottee, the Court said (270 U.S. at 244):

The legislative history of the Act of 1910—Cong. Rec. vol. 45, p. 5811—lends support to this construction; and abundant reason for the provision becomes apparent upon consideration of the infinite difficulties which otherwise would arise in connection with the sundry duties of the Secretary of the Interior relative to Indian allotments.

Section 2 of the Act, 25 U.S.C. 373—directly involved here—complements Section 1 by providing that an allottee may dispose of his restricted property by will if such will is approved by the Secretary. The court below held, on the basis of its previous decisions in *Heffelman v. Udall*, 378 F. 2d 109, 112, certiorari

<sup>3</sup>This Court has always limited review of the Secretary's decisions affecting other aspects of restricted Indian property. *United States v. U.S. Fidelity Co.*, 309 U.S. 506; *United States v. Shaw*, 309 U.S. 495; *Morrison v. Work*, 266 U.S. 481; *United States v. Sherwood*, 312 U.S. 584. See also: *Arenas v. United States*, 197 F. 2d 418, 420 (C.A. 9); *Red Hawk v. Wilbur*, 39 F. 2d 293 (C.A. D.C.)

denied, 389 U.S. 926, and *Attocknie v. Udall*, 390 F. 2d 636, certiorari denied, 393 U.S. 833, that Sections 1 and 2 of the Act must be read in concert, and that the express finality in Section 1, precluding review of the Secretary's determinations of heirship, was applicable to the Secretary's decision in this case, under Section 2, to disapprove a will which disposed of restricted property. The court held that "such a determination comes within the jurisdictional exception stated in section 10 of the Administrative Procedure Act," which precludes judicial review of agency determinations where Congress has specified that such determinations are final.

The position taken by the Tenth Circuit in this case has considerable support in the decided cases. In 1921, this court recognized the complete control Congress had vested in the Secretary for "the administration of the allotment and of all that is connected with or made necessary by it \* \* \*." *Blanset v. Cardin*, 256 U.S. 319, 326. *Nimrod v. Jandron*, 24 F. 2d 613 (C.A. D.C.) recognized the courts' lack of jurisdiction to prevent the Secretary from reconsidering his previous approval of a will. *Hanson v. Hoffman*, 113 F. 2d 780, 790 (C.A. 10), while resolving a dispute as to Indian-owned property, carefully excepted restricted allotments from its decision, and the Tenth Circuit has consistently held that the Secretary's discretion in the area of restricted property is absolute. *Heffelman v. Udall*, *supra*; *Attocknie v. Udall*, *supra*. Only the District of Columbia Circuit has refused to consider Sections 1 and 2 together, and has held that determinations under Section 2 are subject to a narrow

scope of review. *Homovich v. Chapman*, 191 F. 2d 761.

The view that Section 2 of the Act precludes review of the Secretary's discretionary decisions in the same manner as does Section 1 is, we submit, correct. Sections 1 and 2 of the Act, taken together, provide a complete enumeration of the Secretary's supervisory powers over the inheritance of allotted lands. The parallel provisions of these two sections strongly evidences the close ties between them. Both empower the Secretary "in his discretion" to sell the restricted lands and both sections authorize the Secretary to remove restrictions and to issue fee patents to heirs and devisees. The Secretary's role under both of these sections is managerial and supervisory in character, and requires the exercise of discretion. In keeping with the Secretary's fiduciary responsibility to administer allotted lands, both these sections require that the Secretary approve any and all changes in beneficial ownership of a deceased Indian's restricted land. Logic dictates that the Congress intended for the Secretary to have the same scope of authority with respect to approving wills under Section 2 as he does with respect to determining heirs under Section 1. Indeed, it would seem to follow *a fortiori* that the Secretary's discretion to approve a will should be no less than his discretion to determine heirs. In the former case, the Secretary merely decides whether allotted property passes by one method of inheritance or another, while in the latter case the Secretary's determinations result in the selection of specific recipients of allotted property.

The absurd situation which could result if Sections

1 and 2 are not read together is illustrated by the case of *Hayes v. Seaton*, 270 F. 2d 319 (C.A. D.C.). In that case, the Secretary was called upon to decide whether a deceased Indian's son and legatee had survived his father (who left a will), the son (who died intestate) having disappeared one year before the father's death. The majority opinion characterized that decision as a determination of the son's legal heirs, under Section 1. Chief Justice Burger, then Circuit Judge, argued persuasively in his dissent that both Sections 1 and 2 were applicable to that determination. In line with the prior holdings of the District of Columbia Circuit referred to above, Judge Burger felt that Section 2 determinations were reviewable. Yet, an anomalous result might have occurred if that position had prevailed. In the *Hayes* situation, the Secretary's decision, that the son survived the father, was crucial to the disposition of property to the son's heirs (Section 1). If Sections 1 and 2 are not read together, the same decision could have been reviewable in the former context and not reviewable in the latter. Indeed, it is not difficult to imagine that many situations could arise in which the same determination by the Secretary could control questions arising under both Sections 1 and 2 of the Act. Obviously, the scope of the Secretary's discretion in such a situation must be uniform.

It is significant that Congress thought that it was giving the Secretary absolute discretion to make decisions affecting the distribution of restricted estates under both Sections 1 and 2 of the 1910 Act. This is evidenced by the debate found at 45 Cong. Rec. 5812,

61st Cong., 2d Sess. (May 4, 1910). The Court referred to this debate in *First Moon v. White Tail*, *supra*, in which the Court upheld the finality of the Secretary's decisions under Section 1.

Mr. Cox of Indiana. Mr. Chairman, what is the gentleman's opinion as to whether or not the proviso contained in section 2 does not place the complete power of the will in the hands of the Commissioner of Indian Affairs?

Mr. BURKE of South Dakota. The Commissioner of Indian Affairs and the Secretary of the Interior, of course, would not favor the provision permitting Indians to make wills unless the making of them were subject to the approval of the Department.

Mr. Cox of Indiana. *Under the proviso as it now exists in section 2, does it not place complete power in the hands of the Secretary of the Interior and the Commissioner of Indian Affairs over the will of an Indian with absolute power to revoke the Indian's will?*

Mr. BURKE of South Dakota. *I think so.*

Mr. Cox of Indiana. Then after all it simply imposes the entire power of making the will in the hands of the Commissioner of Indian Affairs.

Mr. BURKE of South Dakota. I will say the purpose was this: It frequently happened—and I will speak of that in connection with sections 3 and 4 at the same time—it frequently happened an Indian has three or four children. He was allotted land at the time he had only two children, and the father and the mother have allotments and the two children who were living at the time allotments were made have allot-

ments, but the other children have no land at all.

Now, the Indian is just as human as a white man, and it frequently happens that he desires to have permission to give his allotment to the children who have no land, and in a case of that kind undoubtedly the Interior Department would O.K. it, whereas if it was a will giving his estate to some person who ought not to have it, then they would disapprove it.

Mr. Cox of Indiana. I suppose the purpose of this proviso is *an equitable purpose*, reserving in the Department of the Interior the power to compel the Indian to make a proper will—

Mr. BURKE of South Dakota. Not compel him at all.

Mr. Cox of Indiana. Or else revoke the will if he did not make a proper will.

Mr. BURKE of South Dakota. *If the Indian makes a will, and it is not satisfactory to the commissioner and the Secretary, and I put both in to safeguard it, it will be disapproved of, and of course will be of no effect.*

Mr. Cox of Indiana. Then, if the will does not meet the approval of the Commissioner of Indian Affairs and the Secretary of the Interior, it gives them power to revoke it.

Mr. BURKE of South Dakota. No; it can not be revoked until approved, at least. \* \* \*  
[Emphasis supplied.]

Petitioners' reliance on *Abbott Laboratories v. Gardner*, 387 U.S. 136, is misplaced. In *Abbott*, this Court held that judicial review of an administrative determination should not be precluded unless there is "clear and convincing evidence" of a contrary legislative intent. See also *Rusk v. Cort*, 369

U.S. 367, 379-380. Nothing in the language or legislative history of the Food, Drug, and Cosmetic Act indicated whether the courts had jurisdiction to review the administrative determinations under consideration in that case; accordingly, the Court applied its presumption that the agency findings were reviewable. Neither *Abbott* nor any of the cases preceding it control a case, such as this one, in which the language of the statute, the necessary uniformity of the Secretary's discretionary authority, and the legislative history provide "clear and convincing evidence" of a Congressional intent to preclude review. To the contrary, these cases make it clear that where the requisite evidence of such an intent is present, the courts must abide by Congress' decision and decline to take jurisdiction.

Nor does this case present the constitutional problems which this Court faced in *Estep v. United States*, 327 U.S. 114. In that case, a sharply divided court held that a defendant in a criminal prosecution under the Selective Training and Service Act of 1940 for willful failure and refusal to submit to induction, could raise the defense that the action of his local board in rejecting his claim for conscientious objector status was beyond its jurisdiction. The Court held that the language of the Selective Training and Service Act must be read to allow a court in a criminal proceeding to review, within a very narrow range, the draft board's findings, even though the language of the Act gave some indication that the local board's orders would be final. The Court's opinion was clearly designed to avoid the constitutional problem of allow-

ing a person to be "criminally punished without ever being accorded the opportunity to prove that the prosecution is based upon an invalid administrative order" (concurring opinion of Murphy, J., at 327 U.S. 125). Indeed, Mr. Justice Douglas, delivering the opinion of the Court, expressly recognized that "except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses." 327 U.S. at 120.

The statutory provision under consideration in this case authorizes the Secretary of the Interior, acting in his fiduciary capacity as trustee for Indian allottees, to determine whether, under the circumstances, restricted land ought to pass according to the terms of a will or according to the laws of intestacy. In holding that Section 1 of the Act gives the Secretary non-reviewable discretion to determine the legal heirs to restricted estates, *First Moon v. White Tail*, *supra*, this Court has already recognized that constitutional standards do not require judicial review of the Secretary's decisions concerning the disposition of these lands. See also *United States v. Bowling*, 256 U.S. 484, 487.

Nor, finally, is there merit to petitioners' assertion that even if the Act of 1910 precludes review under the Administrative Procedure Act, the district court properly invoked mandamus jurisdiction in this case under 28 U.S.C. 1361. As this Court has frequently held, the mandamus remedy is available only where

an officer has failed to perform a ministerial duty; it is not employed to "direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either." *Wilbur v. United States*, 281 U.S. 206, 218. See also, *Lane v. Mickadiet*, 241 U.S. 201, 208, 209; *Knight v. Lane*, 228 U.S. 6, 13; *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F. 2d 364, 367 (C.A. 10); cf. *Noble v. Union River Logging Railroad*, 147 U.S. 165, 171-172.

As this Court said in *Wilbur* (281 U.S. at 218-219):

The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus. [Footnotes omitted.]

II. EVEN IF THE ACT HAD NOT PRECLUDED REVIEW OF THE SECRETARY'S DETERMINATIONS, THE REFUSAL TO APPROVE THE WILL IN THIS CASE COULD NOT BE REVERSED BECAUSE THE SECRETARY PROPERLY TOOK EQUITABLE CONSIDERATIONS INTO ACCOUNT IN REACHING HIS DECISION

Even if this Court were to adopt the position of the District of Columbia Circuit, that Section 2 of the Act does not preclude judicial review of the approval or disapproval of a will, the scope of review would be limited to those cases in which the Secretary exceeded the limits of the discretion conferred upon him by the Congress. As the District of Columbia Circuit said in *Homovich*, "[I]f upon such review it appears that [the Secretary's] action was within the scope of the authority conferred upon him, the court cannot disturb his decision." 191 F. 2d at p. 764.

Petitioners contend that the Secretary exceeded his authority in this case by taking equitable considerations into account in reaching his decision. Petitioners do not dispute the fact, amply supported in the record, that the deceased had entirely neglected his daughter, respondent Dorita High Horse, and that approval of the deceased's will would have merely perpetuated the unjust treatment she had suffered. However, petitioners argue that the statute limits the Secretary to passing on those technical questions concerning the validity of the will that would be considered by a probate judge.

This position is untenable. Nothing in the language of Section 2, which provides that no will disposing of restricted Indian property "shall be valid or have

ny force or effect unless and until it shall have been approved by the Secretary of the Interior," suggests that the Secretary must disregard equitable considerations. Indeed, the very nature of the Secretary's role in the allotment system, under which he serves as trustee for restricted Indian allotments,<sup>4</sup> charges him with the responsibility of determining whether any Indian testator has dealt fairly with his family and dependents. The courts have long recognized the Secretary's special fiduciary role with respect to the disposition of restricted allotments. See *Blanset v. Cardin*, *supra*. As Chief Justice Burger, then Circuit Judge, said in *Udall v. Littell*, 366 F. 2d 668, 675, n. 24 (C.A. D.C.), certiorari denied, 385 U.S. 1007, "Indian wards, like individual wards, may often require the intervention of the guardian to prevent unwise action or dissipation of assets."

Examination of the legislative history of the specific provisions under consideration here makes it clear that Congress intended for the Secretary to focus on whether a will equitably dispose of restricted property. We refer again to part of the Congressional debate relied upon by this Court in the *First Moon* case, *supra*.

Mr. BURKE of South Dakota. I will say the purpose was this: It frequently happened—and I will speak of that in connection with sections

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<sup>4</sup>The fiduciary nature of this role is firmly established. *United States v. Hellard*, 322 U.S. 363, 367; *Morrison v. Work*, 266 U.S. 481, 485; *United States v. Sandoval*, 231 U.S. 28, 46; *Choctaw Nation v. United States*, 119 U.S. 1, 27; *Armstrong v. United States*, 306 F. 2d 520, 522 (C.A. 10); *Skokomish Indian Tribe v. France*, 269 F. 2d 555, 560 (C.A. 9); *Rainbow v. Young*, 161 Fed. 835, 838 (C.A. 8).

3 and 4 at the same time—it frequently happened an Indian has three or four children. He was allotted land at the time he had only two children, and the father and the mother have allotments and the two children who were living at the time allotments were made have allotments, but the other children have no land at all.

Now, the Indian is just as human as a white man, and it frequently happens that he desires to have permission to give his allotment to the children who have no land, and in a case of that kind undoubtedly the Interior Department would O.K. it, whereas if it was a will giving his estate to some person who ought not to have it, then they would disapprove it.

Mr. Cox of Indiana. I suppose the purpose of this proviso is *an equitable purpose*, reserving in the Department of the Interior the power to compel the Indian to make a proper will—

Mr. BURKE of South Dakota. Not compel him at all.

Mr. Cox of Indiana. Or else revoke the will if he did not make a proper will.

Mr. BURKE of South Dakota. If the Indian makes a will, and it is not satisfactory to the commissioner and the Secretary, and I put both in to safeguard it, it will be disapproved of, and of course will be of no effect. [Emphasis supplied.]

The weakness of petitioners' argument that the Secretary exceeded his authority by taking into account equitable considerations is apparent from the fact that it is supported mainly by examples of cases in which the Secretary approved wills which arguably disposed of allotted property in an equitable manner. See Peti-

tioners' brief, pp. 20-26. The short answer to petitioners' use of these cases is that it appears that the Secretary considered the equitable factors but decided either that they required approval of the will or at least that they did not justify disapproval. See, *e.g.*, *Estate of Wook-Kah-Nah*, 65 I.D. 436, affirmed *sub nom. Aasenap v. Huff*, 312 F. 2d 358 (C.A.D.C.).

The government's role as the special guardian of Indians who live on reservations or who own restricted lands is an unusual one and has a largely historical basis. In the light of this history, Congress alone has the right to determine the extent to which the country's guardianship of Indians shall continue. *United States v. Sandoval*, 231 U.S. 28, 46; *United States v. McGowan*, 302 U.S. 535, 538. There is no basis for establishing, through judicial action, greater Indian autonomy, in piecemeal fashion, by denying the Secretary's statutory right to approve or disapprove an Indian will on equitable grounds.

#### CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,  
*Solicitor General.*

SHIRO KASHIWA,  
*Assistant Attorney General.*

RICHARD B. STONE,  
*Assistant to the Solicitor General.*

EDMUND B. CLARK,

ROBERT S. LYNCH,

*Attorneys.*

DECEMBER 1969.

**RE COPY**

No. 300

Office-Supreme Court, U.S.  
**FILED**  
JAN 8 1970  
JOHN F. HAYES, CLERK

In the  
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1969**

James Tooahimpah Tate,  
Vila Tooahnippah (Paddlety),  
Julia Tooahnippah (Goombi),  
and James Tooahimpah Tate,  
the duly qualified and acting  
Administrator of the Estate  
of Frankie Lee Tooahnippah,  
deceased,

*Petitioners,*

**VERSUS**

Walter J. Hickel, Secretary of  
the Interior for the United  
States, and Dorita High Horse,  
*Respondents.*

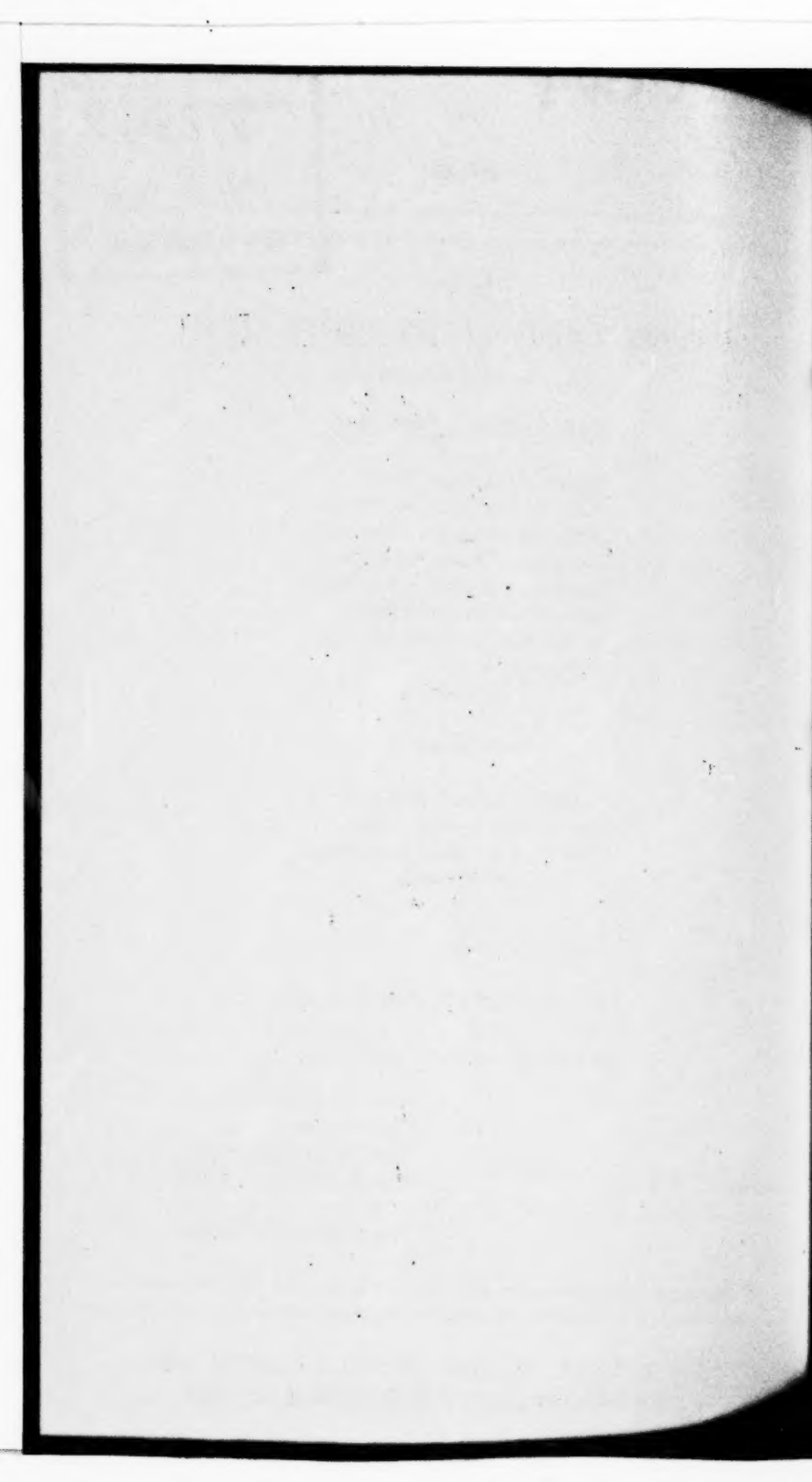
**REPLY BRIEF OF PETITIONERS**

January, 1970

Omer Luellen  
P.O. Box 96  
First State Bank Bldg.  
Hinton, Oklahoma 73047

*Counsel for Petitioners*

**PETITION FOR CERTIORARI FILED JUNE 28, 1969  
CERTIORARI GRANTED OCTOBER 13, 1969**



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In the  
SUPREME COURT OF THE UNITED STATES

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October Term, 1969

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JAMES TOOAHIMPAH TATE, et al.,  
Petitioners

v.

WALTER J. HICKEL, et al.,  
Respondents

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

---

REPLY BRIEF OF PETITIONERS

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January, 1970

REPLY OF PETITIONERS TO STATEMENT OF CASE  
OF RESPONDENT, DORITA HIGH HORSE, IN HER  
ANSWER BRIEF OF DECEMBER, 1969.

In the statement of the Case found in the Answer Brief of Dorita High Horse, Respondent, Page 7, there appears the following paragraph:

"It will be noted in passing that much of Petitioners' statement of the case is argumentative and inappropriate to that section of their brief. Respondent objects strenuously to the constant characterization of her as being an illegitimate, as she is legitimate by the very terms of Title 23 U.S. 371."

Your Petitioners believe that their Statement of the Case as set out in their Brief of November, 1969, was a factual and correct statement. Apparently, Dorita High Horse is concerned by the statement in the Brief of your Petitioners that she was the illegitimate daughter of George Chahsenah. The Secretary of the Interior on Appeal, acting by and through the Regional Solicitor, said that the decedent, George Chahsenah, was the natural father of Dorita High Horse and the Examiner of Inheritance found that George Chahsenah had never been married but that even though the evidence was conflicting, Dorita High Horse was found to be the daughter of the decedent, George Chahsenah, and entitled to inherit as the sole heir at law if the decedent had died intestate. The Circuit Court of Appeals for the Tenth Circuit (Joint App. 45-46) stated as follows:

"The basic facts are without dispute. One George Chahsenah, a Comanche Indian, died, leaving a will dated March 4, 1963, and by this instrument left all of his estate consisting of Indian Trust property to his niece and her three children, who are the appellees in both appeals. <sup>1</sup> Pursuant to 25 U.S.C. § § 372 and 373, after hearings, a Department of Interior Examiner of Inheritance approved the will and ordered distribution of the estate accordingly. Appellant, Dorita High Horse, the natural daughter of the testator, contested the will before the Examiner and appealed the decision to the Secretary of the Interior." (Footnote deleted).

Your Petitioners further state that the following definition for a natural child is found in Black's Law Dictionary, Second Edition, published by the West Publishing Company at Page 197:

"NATURAL CHILD. A bastard; a child born out of lawful wedlock. But in a statute declaring that adopted shall have all the rights of 'natural' children, the word 'natural' was used in the sense of 'legitimate.' *Barns v. Allen*, 9 Am. Law Reg. (O.S.) 747. In Louisiana. Illegitimate children who have been adopted by the father. Civ. Code La. art. 220. In the civil law. A child by natural relation or procreation; a child by birth as distinguished from a child by adoption. Inst. 1, 11, pr.; Id. 3, 1, 2; Id. 3, 8, pr. A child by concubinage, in contradistinction to a child by marriage. Cod. 5,27."

Judge Eubanks, the Trial Court Judge, apparently had considerable doubt as to the validity of the finding by the Secretary of the Interior acting by and through the Regional Solicitor, and the Examiner of Inheritance that George Chahsenah was the father of Dorita High Horse as he so cogently set out in footnote 6 of his Opinion (Joint App. 32-33):

"This court has not found the evidence of the decedent's paternity nearly as convincing as did the hearing examiner and the Regional Solicitor. The evidence in that regard which is contained in the administrative record is conflicting and, in my view, could have supported a finding to the contrary. I am intrigued by the singular fact that the mother of this putative daughter, Mary High, must have suffered from an equal lack of conviction of the decedent's paternity, as evidenced by her actions at the time of Dorita High Horse's birth. She attributed paternity to a different individual, and that individual is named as the father in the birth certificate which was prepared at the time. The only telling evidence in support of the finding is a skillfully typewritten letter, dated August 31, 1949, and obviously not prepared by the decedent, which is addressed to the Oklahoma Bureau of Vital Statistics and which is purported to be signed by the decedent, wherein it is stated that Dorita High is his daughter and that he was 'perfectly willing for her to use his name as her name on her birth certificate or in school.' The record would seem to indicate that, until she acquired the surname 'Horse' as a result of her present marriage, she went by the surname of her mother."

Your Petitioners further note that in the Statement of the Case in the Answer Brief of Dorita High Horse, considerable emphasis is again placed upon the addiction of George Chahsenah to the use of alcohol during his life time. As previously stated in the November, 1969, Brief of your Petitioners, one of the principal reasons for contesting the Will of George Chahsenah was an attempt on the part of the contestants to prove that George Chahsenah was an alcoholic and was never sober enough to make a valid Will for several years prior to his death. The contest of the Will of George Chahsenah was disallowed and the Secretary of the Interior acting by and through the Regional Solicitor and the Examiner of Inheritance both held that the factum of the Will was proper and met all technical requirements, but the Secretary of the Interior acting through the Regional Solicitor on appeal would not approve the Will of George Chahsenah because he stated that the decedent did not achieve by the execution of his Will, a just and equitable treatment of his heirs at law, and particularly Dorita High Horse, his natural daughter.

REPLY OF PETITIONERS TO ARGUMENT PART I  
STYLED "THE LEGISLATIVE HISTORY AND PREVIOUS  
DECISIONS OF THIS COURT ARE CONSISTENT WITH  
THE HOLDING THAT THE SECRETARY'S ACTION IS  
NOT SUBJECT TO REVIEW BY THE COURTS" OF  
RESPONDENT, DORITA HIGH HORSE, IN HER ANSWER  
BRIEF OF DECEMBER, 1969.

In the Answer Brief of Dorita High Horse of December, 1969, Pages 11, 12, and 13, there appears a discourse found in 45 Cong. Rec. 5812 between Mr. Burke, the Chairman of the Indian Affairs Committee at that time, and certain other members of Congress, which discourse took place shortly prior to the passage of the Act of June 25, 1910. Your Petitioners are of the

opinion that consideration should be given to the temporal depth of the statements contained in the legislative history as set out in the discourse between Congressman Burke and the other Congressmen. It must have been the opinion of Congressman Burke, approximately sixty (60) years ago, that the Secretary of the Interior would exercise strict control of the contents of Wills made by Indian testators, but this was not the interpretation placed on Section 2 of the Act of June 25, 1910, by the Secretary of the Interior. Your Petitioners particularly refer to a portion of the Memorandum of May 10, 1941, addressed to the Assistant Secretary of the Interior (Nov. 1969 Brief of Petitioners, App. B, B-2, and B-3):

"The record shows that the testator was of sound and disposing mind at the time of the execution of his will. No evidence whatever of fraud, duress, undue influence or other imposition is contained in the record. The testator devised certain inherited interests having a value of about \$900 to Louie J. Grende, a white man. Specific devises were also made to Matilda Fleet, a Spokane Indian, and Maud Jennings, half-sister and closest living relative of the testator who is also made sole residuary devisee and legatee. In a written statement made contemporaneously with the will, the testator was careful to explain his reasons for these dispositions. According to that statement the devise to Grende was made because Grende had provided him with a home and had taken good care of him. The devise to Matilda Fleet was made because the subject of the devise was the allotment of Matilda's father and Matilda already had an interest in it. The devise to Maude was made be-

cause he wanted her to have all of his inherited interest on the Coeur d'Alene Reservation. If the will be disapproved, all of these stated desires of the testator will be defeated. Matilda who is not a heir will take nothing. Grende, the white man, would likewise take nothing as an heir but in recognition of services rendered to him by the decedent it is proposed to allow a claim in his behalf against the estate in the amount of \$600. Maud, while an heir, would have to share the land interests intended to be given her with others. Finally, five people not intended to be objects of the testator's bounty would be given a one-tenth interest each in the entire estate.

The act of June 25, 1910 (36 Stat. 856), as amended, declares that any person having restricted lands or other restricted or trust property, 'shall have the right \*\*\* to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior' with the proviso that no such will shall have any validity unless approved by the Secretary. The right to make a will is thus conferred on the Indian not on the Secretary. Whatever discretion the Secretary may have in the matter of approving or disapproving the will, it is clear that this discretion should not be exercised to the extent of substituting his will for that of the testator. Such would clearly be the effect of disapproval in the present case. The naming of a non-Indian as one of the beneficiaries obviously is not a valid objection to approval of the will in the absence of fraud or other

imposition, which clearly is not present.  
(Emphasis added).

I recommend that the will be approved."

Your Petitioners note that at the bottom of Page 15 in the Answer Brief of Dorita High Horse, there appears the statement that jurisdiction was vested in the Courts for the approval of Indian Wills prior to the Act of June 25, 1910. Your Petitioners believe that this statement is in error because it is your Petitioners understanding that Indians receiving allotments under the General Allotment Act of 1887 had no authority or Statute authorizing Indians of this class the right to execute Wills bequeathing and devising their trust property and lands prior to the Act of June 25, 1910, by which Section 2 of said Act did then give the Indians the right to execute Wills. Consequently, it was incorrect for Dorita High Horse to say that jurisdiction to approve the Will of an Indian testator was taken from the Courts and given to the Secretary of the Interior by the Act of June 25, 1910, because the Indian testator had no right of any kind relative to his trust properties to make a Will prior to June 25, 1910.

Your Petitioners further state that Blanset v. Cardin, 256 U.S. 319 (1921) was quoted with approval in the Answer Brief of Dorita High Horse at Pages 14 and 15 in said Brief. Your Petitioners agree with this authority, but nevertheless, they would like to call to the attention of the Court that the quotation from Blanset v. Cardin, supra in the Answer Brief of Dorita High Horse, omitted a portion of the Opinion near the end of Page 326 in said Opinion. The sentence omitted from said Opinion by Dorita High Horse in her Answer Brief is as follows:

"And the regulations of the department are administrative of the act and partake of its legal force."

Reiterating then, Blanset v. Cardin supra is authority that the Regulations of the Department of the Interior are administrative of the act and partake of legal force, and as your Petitioners have previously stated in their Brief of November, 1969, and particularly as set out in the Appendix to said Brief (App. A, A-2, A-3, and A-4) the Regulations of the Secretary of the Interior are absolutely void of any statement or requirement that the Indian testators must execute their Wills in such a manner that they will disburse equity among their heirs. As a matter of fact, the Regulations may be summarized by quoting Regulation 15.28:

"§ 15.28 'Making, approval as to form, and revocation of wills.' (a) An Indian of the age of 21 years and of testamentary capacity, who has any right, title, or interest in trust or restricted property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses.

(b) Where a will has been executed and filed with the superintendent during the lifetime of the testator, the will shall be forwarded by the superintendent to the examiner of inheritance, who shall pass on the form of the will and then return it to the superintendent with appropriate instructions. A will shall be held in absolute confidence, and its contents shall not be divulged prior to the death of the testator.

(c) The testator may, at any time during his lifetime, revoke his will by a subsequent

will or other writing executed with the same formalities as are required in the case of destroying the will with the intention of revoking it. No will that is subject to the regulations of this part shall be deemed to be revoked by operation of the law of any State."

After reading said Regulations, we ascertain that the only requirement for an Indian testator to make a Will is that the Indian must be 21 years of age and of testamentary capacity. Of course, undue influence would cloud his testamentary capacity as would fraud, mental incompetency and the other usual grounds for voiding Wills due to the failure of the testator to possess proper testamentary capacity and there appears no mention of the Indian disbursing equity when he executes his Will.

The instructions found on the printed Will forms furnished by the Department of the Interior instructing Field Officers as to the procedure to be followed when an Indian testator executes his Will, are found in the Joint Appendix filed herein at Page 66 and a portion of the instructions in question are as follows:

"3. Witnesses and testator must sign in the presence of each other.  
Read the will carefully to testator and be sure that he understands it and that it expresses his wishes. (Emphasis added).

We thus see again, a total void of any mention that the Indian testator is under an obligation to execute a Will that will disburse equity among his heirs.

At Page 22 in the Answer Brief of Dorita High Horse, she mentions that Heffelman v. Udall,

378 F.2d 109 (10th Cir. 1967), Cert. den. Nov. 7, 1967, 389 U.S. 926, is authority that Sections 1 and 2 of the Act of June 25, 1910, 25 U.S.C. Secs. 372 and 373 were to be read as complementing each other and that your Petitioners believe that Heffelman v. Udall supra did not make a valid statement in regard to Sections 1 and 2 complementing each other.

Section 1 of the 1910 Act, 25 U.S.C. 372 provides that any Indian to whom an allotment of land has been made, or may hereinafter be made, dies before the expiration of the trust period or before the issuance of a fee simple patent, without having made a Will, then the Secretary of the Interior shall ascertain the legal heirs of the said Indian decedent and his decision shall be final and conclusive.

Section 2 of the 1910 Act, 25 U.S.C. 373 states that any person of the age of 21 years having any right, title, or interest in an Indian allotment held under trust or other patent containing restrictions or having individual Indian moneys or other property held in trust shall have the right prior to the expiration period of the trust, to dispose of such property by Will in accordance with regulations to be prescribed by the Secretary of the Interior provided, however, That no Will so executed shall be valid unless and until it is approved by the Secretary of the Interior.

Your Petitioners hope that this Court will note that there is a considerable variance between Section 1 of the 1910 Act and Section 2 of the 1910 Act. Section 1 of the 1910 Act states that the decision of the Secretary of the Interior relative to the heirs of the decedent Indian shall be final and conclusive and Section 2 of the 1910 Act does not contain the final and conclusive

phrase. Also, Section 1 of said Act states that it applies to Indians having allotments or who will hereafter have allotments and dies without having made a Will, while Section 2 of said Act applies to all persons of the age of 21 years or over having any right, title, or interest, in any allotment held in trust or restricted or having an interest in trust moneys, shall have the right to dispose of said properties by a Will.

Section 1 of the 1910 Act applied only to Indians having allotments or who will thereafter have allotments, while Section 2 of said Act applies to any person or persons over the age of 21 years having an interest in trust properties, including real property and personal property giving said persons, even non-Indians and Indians not having allotments the right to make a Will provided said Will is made in accordance with the Regulations issued by the Secretary of the Interior. There are many variances between Section 1 and Section 2 of the 1910 Act and your Petitioners disagree with the Heffelman premise that Sections 1 and 2 of said Act complement each other and should be considered together.

At Page 22 continued on Page 23 in the Answer Brief of Dorita High Horse, there appears the argument that the right of review under the Administrative Procedure Act where agency action is by law committed to agency discretion prohibits Judicial review and Dorita High Horse continues with the argument that Section 2 of the Act of June 25, 1910, as amended, gives the Secretary of the Interior wide powers that are discretionary and the implication, of course, is that due to the discretionary powers of the Secretary of the Interior under Section 2 of the Act of June 25, 1910, as amended, Judicial review under the Administrative Procedure Act is prohibited because agency action is by law committed to agency discretion. This argument was presented

by the Secretary of the Interior in Homovich v. Chapman, 191 F. 2d 761 (D.C. Cir. 1951) which involved litigation concerning the Will of an Indian and the approval or disapproval of same by the Secretary of the Interior pursuant to Section 2 of the Act of June 25, 1910, as amended by the Act of February 14, 1913. At Page 764 in the Opinion, Circuit Judge Prettyman answered two arguments of the Secretary of the Interior, namely, that the final and conclusive clause of Section 1 of the 1910 Act prohibits review under Section 2 of the 1910 Act as amended, and the second argument was that the Administrative Procedure Act prohibits Judicial review where agency action is by law committed to agency discretion:

"The Secretary maintains that his action in respect to the wills of Indians is not reviewable by the courts. But the actions of Secretaries in respect to these wills have been reviewed by the courts,<sup>5</sup> and no case to the contrary is cited to us. Such review is not precluded by the statute. The Secretary argues that, because Section 1 of the 1910 Act, dealing with the determination of the heirs of an Indian who dies without a will, provides that his determination 'shall be final and conclusive', therefore Section 2 of that Act, deal-

- 
4. Blundell v. Wallace, 1925, 267 U.S. 373, 45 S.Ct. 247, 69 L.Ed. 664; Blanset v. Cardin, 1921, 256 U.S. 319, 41 S.Ct. 519, 65 L.Ed. 950; Hanson v. Hoffman, 10 Cir., 1940, 113 F.2d 780.
  5. See cases cited note 4 supra; also Nimrod v. Jandron, 1928, 58 App. D.C. 38, 24 F.2d 613.

ing with wills, must be read as though it contained a similar provision, although in fact it does not. We think it plain that, if Congress had meant that the decisions in Section 2 should be final and conclusive, it would have said so; in the immediately preceding paragraph it had so provided when it meant to do so. The mere fact that the acts of the Secretary in providing regulations for the execution of these wills and in approving them, required the exercise of discretion and judgment on his part, does not preclude judicial review of his action. To be sure, if upon such review it appears that his action was within the scope of the authority conferred upon him, the court cannot disturb his decision. But that is a different rule from the rule of total non-reviewability. The Administrative Procedure Act (Section 10) <sup>6</sup> forbids judicial review only where statutes 'preclude' such review or where agency action is 'by law committed to agency discretion.' No statute 'precludes' this review, and the Secretary would have us

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6. 60 Stat. 243 (1946), 5 U.S.C.A. § 1009. See discussion in *Kristensen v. McGrath*, 1949, 86 U.S. App. D.C. 48, 179 F.2d 796 (not discussed by Supreme Court, *McGrath v. Kristensen*, 1950, 340 U.S. 162, 169, 71 S. Ct. 224, 95 L.Ed. 173; also in *Air Line Dispatchers Ass'n, et al. v. National Mediation Board, et al.* 1951, 89 U. S. App. D.C., \_\_\_\_\_, 189 F.2d 685, and also in *Capital Transit Company v. United States*, 1951, D.C., 97 F.Supp. 614.

stretch the second prohibitory clause far beyond its meaning. He says that there can be no review where agency action 'involves' discretion or judgment. Obviously the statute does not mean that; almost every agency action 'involves' an element of discretion or judgment. Whether the court should set aside an agency action founded upon the exercise of discretion and judgment is, as we have said, a totally different question from whether the court may review the action for purposes of determining its validity.

The judgment of the District Court must be and is hereby

Affirmed."

Also, the argument that agency discretion prohibits Judicial review has been cogently stated to be a false premise in many instances by Professor Louis L. Jaffe, Professor of Administrative Law, in his textbook, Judicial Control of Administrative Action at the bottom of Page 374:

"The other exception of action 'committed to agency discretion' has, perhaps understandably, created a certain confusion and uncertainty. The further provisions of the judicial-review section make it clear that the mere presence of agency discretion does not oust review. Under the heading 'Scope of Review' an agency action may be set aside for 'an abuse of discretion,' 278

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278 APA § 10 (e), 60 Stat. 243 (1946), 5 U.S.C. § 1009 (e).

which clearly implies reviewability despite the presence of discretion. As one court has said, 'almost every agency action 'involves' an element of discretion or judgment.'" 279

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279 Homovich v. Chapman, 191 F.2d 761, 764 (D.C. Cir. 1951). See also Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958).

Another recent case relative to Judicial review where agency discretion is used is the case of Jones v. Freeman, 400 F.2d 383 (1968). The Court of Appeals for the Eighth Circuit held that Judicial review could be given to a regulation issued by the Secretary of Agriculture permitting the Forest Service to impound trespassing livestock in a national forest. The Circuit Court, Judge Heaney, in his Opinion in Jones v. Freeman supra, makes the following enlightening observation at Pages 389 and 390 in said Opinion:

"Finally, we consider whether the action is one 'committed to agency discretion by law,' 5 U.S.C. § 701 (a) (2), and, thus, not reviewable. See generally, United States v. Pink, 315 U.S. 203, 63 S. Ct. 552, 86 L. Ed. 796 (1942).

The Secretary's discretion to preclude privately-owned animals from the National Forest is accepted by the plaintiffs and is recognized by this Court. United States v. Reeves, D.C., 39 F. Supp. 580 (Ark. 1941). Cf. McMichael v. United States, 355 F.2d 283 (9th Cir. 1965).

Judicial review under a statute authorizing agency action is not preclud-

ed because some of that action may be 'committed to agency discretion by law.' 5 U.S.C. § 701 (a) (2). Rather, judicial review is precluded only to the extent that such discretion exists. Davis, Unreviewable Administrative Action, 15 F.R.D. 411, 428 (1954).

The act of impounding and assessing expenses involves little or no discretion. They are acts based on a perception of facts. Few policy judgments are involved. The actions are judicially reviewable. 9 "

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9. Many agency actions involving discretion are subject to judicial review. *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964); *Homovich v. Chapman*, 89 U.S. App. D.C. 150, 191 F.2d 761 (1951). This is evident upon an examination of Section 706:

'§ 706. Scope of review

'\* \* \* The reviewing court shall \_\_\_\_  
'\*

'(2) hold unlawful and set aside agency action, findings, and conclusions found to be \_\_\_\_

'(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

'\* \* \*'

(Emphasis added.)

This Court will observe upon reviewing the Joint Appendix filed herein that in the Motion of Plaintiffs for Summary Judgment in the Joint

Appendix, Pages 25 and 26, one of the grounds of the Plaintiffs for Summary Judgment was as follows:

"1. The Defendant's actions complained of are arbitrary, capricious, unreasonable and an abuse of discretion and are not in accordance with the Law and are not supported by substantial evidence." (Emphasis added.)

and of course, Judge Eubanks, the Trial Court, approved and granted the Plaintiffs Motion for Summary Judgment. Judge Eubanks, in his Opinion overruling the Secretary of the Interior for non-approval of the Indian testators Will, Joint Appendix 35 and 36, made the following cogent observation:

"Congress has conferred the will making right upon all adult Indians. The only limitation upon that right is that the will must be approved by the Secretary of the Interior. It is incumbent upon the Secretary that he not lose sight of the fact that the will making right has been conferred upon the Indian and not upon the Secretary. Surely there must be a point beyond which the Secretary cannot go in withholding his approval before his act of disapproval is to amount to an arbitrary denial of the statutory will making right.

Where disapproval is founded upon some rational basis, denial of approval of an Indian will cannot be said to be an abuse of discretion. <sup>7</sup> Examples of what may constitute reasonable bases upon which approval may be denied are lack of testamentary capacity, fraud,

duress, coercion, undue influence, over-reaching, substantially changed conditions as to the decedent's heirs or estate occurring subsequent to the making of the will, and improvident disposition. In the decision now under review, the will was denied approval because the decedent had failed to make provision for a daughter born out of wedlock. In *Attocknie v. Udall*, 261 F. Supp. 876 (W.D. Okla. 1966), this court upheld a decision of the Secretary which granted approval to an Indian will in exactly opposite circumstances from those presented here. In that case approval was granted to a will wherein no provision was made for a son born out of wedlock. I am unable to perceive the distinction wherein that will was considered to be susceptible of approval but the will which is the subject of this review was not considered to be susceptible of being accorded the same treatment.

This decedent's will was not an unnatural one in light of the circumstances. Someone has lost sight of the fact here that Congress has conferred the right to make a will upon the Indian and not upon the Secretary. The Secretary can no more use his approval powers to substitute his will for that of the Indian than he can dictate its terms. If the will making right is to be meaningful the Indian must be given a free hand to decide upon those persons who shall be the object of his bounty without unreasonable Secretarial interference. I find that the denial of approval of the last will and testament of George Chahsenah lacks a rational basis and is an unreasonable and arbitrary denial of a right conferred upon him by Congress.

The motion of the plaintiff is granted, the motions of the defendant and the intervenor are denied, and the will is remanded to the Secretary of the Interior with directions to approve it and distribute the decedent's estate in accordance with its provisions." (Footnote deleted.)

REPLY OF PETITIONERS TO ARGUMENT PART II STYLED  
"EVEN IF THE SECRETARY'S ACTION IS SUBJECT TO  
JUDICIAL REVIEW, THE SCOPE OF THAT REVIEW IS  
LIMITED TO THE DETERMINATION BY THE COURTS AS  
TO WHETHER THAT ACTION IS WITHIN THE SCOPE OF  
THE AUTHORITY CONFERRED UPON HIM" OF RESPONDENT,  
DORITA HIGH HORSE, IN HER ANSWER BRIEF OF  
DECEMBER, 1969.

At Pages 23 and 24 in the Answer Brief of Dorita High Horse, there appears the argument that the Secretary of the Interior was not exceeding his authority in this case even if it should be held that the action of the Secretary is subject to Judicial review.

The following appears at the bottom of Page 23 and at the top of Page 24 in said Brief:

"Then in a proviso, he is delegated the authority to approve Wills. It is submitted that this authority transcends the power to check the Will for compliance with the formalities prescribed by the regulations. The proviso says, 'no will so executed,' i.e., in compliance with the regulations adopted, 'shall be valid or have any force or effect unless it shall have been approved by the Secretary."

Your Petitioners note that Dorita High Horse has not correctly quoted the proviso and she says

specifically as follows:

"'shall be valid or have any force or effect unless it shall have been approved by the Secretary.'"

which is referring to the approval of the Will by the Secretary of the Interior. The correct statement as the proviso appears in the Statute Books is as follows:

"That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior."

In other words, careful scrutiny will show that the phrase "and until" was left out of the quotation of the proviso of the Statute in question by Dorita High Horse. The conjunctive phrase "and until" is an expression of a happening that will occur in the future and the Statute when correctly quoted connotes an entirely different meaning from the quotation as set out by Dorita High Horse in her Brief. If the only conjunction in the proviso was "unless", the proviso could be interpreted to mean that the Secretary of the Interior had the absolute authority to either approve or disapprove Wills of Indian testators, but when both conjunctions "unless and until" are used together, an entirely different meaning is expressed by the proviso in the Statute. It is the opinion of the Petitioners that the Statute as correctly quoted using both conjunctions "unless and until" does not give the Secretary of the Interior the arbitrary power to refuse to approve the Will of an Indian for equity.

There would be no criteria by which an Indian could make his Will and by which the employees of the Bureau of Indian Affairs could advise an Indian on how to make his Will if the Secretary of the Interior has the right to arbitrarily refuse to approve an Indian testators Will based on his decision that the Indians Will was not compatible with one or more rays of equity shinning out from the equitable spectrum as compiled by the Secretary of the Interior.

REPLY OF PETITIONERS TO ARGUMENT PART III STYLED "REGARDLESS OF THE DECISION AS TO REVIEWABILITY, AND THE LIMITED DEGREE OF REVIEW SUGGESTED ABOVE IN II, NEVERTHELESS THE ACTION OF THE SECRETARY MUST BE SUSTAINED BY THIS COURT BECAUSE THE DECISION OF THE SECRETARY WAS NOT CAPRICIOUS OR ARBITRARY, BUT HAD A RATIONAL BASIS. UNDER THESE CIRCUMSTANCES, THE SUBSTITUTION BY A COURT OF ITS JUDGMENT FOR THAT OF THE SECRETARY WOULD BE A USURPATION OF THE CONGRESSIONAL DELEGATION OF DISCRETION TO THE SECRETARY" OF RESPONDENT, DORITA HIGH HORSE, IN HER ANSWER BRIEF OF DECEMBER, 1969.

Dorita High Horse has stated in her Answer Brief that the decision of the Secretary of the Interior to disapprove the Will of George Chahsenah had a rational basis and she quotes in her Answer Brief at Pages 26, 27, and 28 from the Opinion of the Regional Solicitor speaking for the Secretary of Interior, which Opinion of the Regional Solicitor is set out in full in the Joint Appendix at Pages 82 through 87 inclusive. Upon detailed examination of this Opinion, the Court will ascertain prior to the quoted part of said Opinion that the Regional Solicitor had held that the Will in question met all of the technical requirements

of making a Will, that the factum of the Will was proper, and the preceding paragraph of the Opinion of the Regional Solicitor is as follows:

"The Examiner concluded that the will dated March 14, 1963, met the technical requirements for a valid will and was not unnatural in failing to provide for the decedent's daughter as there was no evidence that the decedent had any close paternal ties to the daughter during the later part of his life. He thereupon approved the latest purported will of the decedent by an order dated August 31, 1966, apparently without considering whether the circumstances were such as to justify such approval as an exercise of the discretionary authority conferred upon the Secretary by 25 U.S.C. § 373. The Secretary's responsibility is not adequately discharged when he, or an examiner acting for him, determines that a purported will meets the technical requirements for a valid dispositive instrument and thereupon, without further consideration, approves the will as a matter of course. When a purported will is submitted for approval and it has been determined that it meets the technical requirements for a valid will, further consideration must be given before approving or disapproving it to determine whether approval will most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law. <sup>1</sup>" (Footnote deleted.)

Dorita High Horse in her Answer Brief also omitted the last paragraph of the said Opinion of the Regional Solicitor and the omitted paragraph is as follows:

"Each of the decedent's previous wills would receive similar disposition if offered for approval because each of them disinherits the decedent's daughter. It follows that no useful purpose would be served by additional hearings, for which reason the Examiner's denial of a petition for rehearing is not reversed. Accordingly, the entire estate of the decedent remaining after payment of allowed claims shall be distributed, without further order of the Examiner, to Dorita High Horse as the sole heir of the decedent."

In other words, the Regional Solicitor, speaking for the Secretary of the Interior through his delegated authority, became entirely intoxicated by the manner in which he exercised his discretionary responsibility, which the Regional Solicitor said was the responsibility to determine whether or not the Will of George Chahsenah would achieve a just and equitable treatment of the beneficiaries thereunder and the heirs at law of George Chahsenah, the decedent Indian testator.

The Regional Solicitor, speaking for the Secretary of the Interior, stated that he would disapprove all prior Wills of the Indian testator and although his Order disapproving the prior Wills is probably void for lack of due process, nevertheless, it does show the bias in this case of the Regional Solicitor, speaking for the Secretary of the Interior. The Secretary of the Interior has made an official statement in said Opinion that no Indian testator could make a Will willing out his natural child or illegitimate child where the Indian testator had not supported the said natural or illegitimate child while the said child was a minor and if a Will was so executed, it would not be approved by the Secretary of the Interior.

The entire record in this case concerning the addiction of the Indian testator to alcohol and the fact that he made several prior Wills and that he had spent his money foolishly at times, was to no avail in the attempt to discredit his Will if the equity theory of the Secretary of the Interior is followed because the Indian testator had failed to provide for his natural or illegitimate daughter in the terms of his Will and therefore, his Will would be disapproved for the equity reason only. In converse, if the evidence had shown that the Indian testator had been an outstanding citizen and had participated in Civic Affairs and had been deeply religious the latter part of his life, and had made a Will giving a portion of his Estate to his Church and perhaps to other public institutions and his Indian kin folk with whom he lived at the time of his death, the same equity reasoning would be applied and the Will would still be unapproved by the Secretary of the Interior because of the failure of the Indian to provide for his natural daughter under the terms of his Will.

It is your Petitioners interpretation of the Opinion of the Secretary of the Interior in the case under consideration that the Secretary of the Interior has actually stated that the factum of the Will is immaterial if an Indian has a natural or illegitimate child that he did not support during the minority of the child, if the Will of the Indian does not devise and bequeath a substantial part of the Estate of the Indian to the said natural child, which, in the opinion of your Petitioners, is an attempt by the Secretary of the Interior to exercise his authority in such a manner that he will substitute his Will for that of the Indian and even though the Secretary of the Interior in certain cases might have certain discretionary responsibilities, he has misused his responsibility herein.

REPLY OF PETITIONERS TO ARGUMENT OF DORITA HIGH  
HORSE AND THE SECRETARY OF THE INTERIOR THAT  
JURISDICTION HEREIN PURSUANT TO MANDAMUS 28 U.S.C.  
1361 IS IMPROPER IN THIS CASE.

Your Petitioners will reply to both the argument of Dorita High Horse and to the Secretary of the Interior in their Answer Briefs that there is no merit to the argument of your Petitioners that 28 U. S.C. 1361 on Mandamus applies in this case, therefore in Reply to the said statement in the Answer Briefs concerning 1361 on Mandamus, your Petitioners state that they realize that this Court has decided many cases on Mandamus in the years past and each Justice of this Court has previously determined in his own mind the fundamental precepts of the law of Mandamus.

Your Petitioners would like to present to the Court for their further consideration of the law of Mandamus, the following pertinent quotations from Clark Byse and Joseph V. Fiocca in their article on the Mandamus and Venue Act in Volume 81 of the Harvard Law Review Article 308 at Pages 333 and 334 as follows:

"The superiority of the equitable tradition stems from the fact that in actions applying equitable principles 'courts and counsel typically focus immediately upon merits,' that is, the scope of the delegated power, whereas in cases applying mandamus principles, analysis often is clouded by the ministerial-discretionary distinction and other technicalities of mandamus law.

As a mode of analysis, the ministerial-discretionary dichotomy is largely illusory because there are few federal administrative determinations that do not involve an element of discretion and few that are

wholly discretionary. Examples of the latter might be the President's selection of members of his Cabinet and his conduct of foreign affairs; but except for this very limited class of completely discretionary functions, administrative officials typically have discretion concerning some elements of their decisions and lack discretion concerning other elements. For example, issuance of passports is a discretionary act, but that discretion does not include withholding a passport because of the applicant's beliefs or associations. The fact that the officer has discretion is not conclusive; the determinative issue is the scope of the discretion. Only after that issue has been resolved can it be decided whether the act in question is subject to judicial control.

In making discretionary determinations, administrative officials usually take into account a variety of factors. A litigant may contend that the applicable statute does not permit the administrator (1) to consider a particular factor, or (2) to give a particular factor controlling weight, or (3) to refuse to consider a possibly relevant factor. When these contentions are presented to a court, it must decide whether the administrator's action was consistent with the particular statute and the congressional purpose. This is what courts do in injunction actions against administrators and in other judicial review proceedings. The same process should be utilized in mandamus actions, because they present the same basic issue: the proper scope of the administrator's authority.

The weakness and undesirability of the ministerial-discretionary distinction is that it permits - perhaps encourages - courts to avoid the difficult task of determining the scope of the delegated power or discretion. Rather than studying the applicable statute, its legislative history, administrative practice under the statute, and utilizing all other relevant aids to determine the scope of the discretion, the judge may conclude that since the official was meant to exercise discretion, the writ will not issue. This, of course, deprives the petitioner of meaningful judicial review, for typically he does not contend that the defendant official was not delegated any discretion but, rather, that withholding the relief requested for the reasons stated was not a permissible exercise of the discretion delegated." (Emphasis added.) (Footnotes deleted.)

The said Article goes further into detail concerning actions filed under 28 U.S.C. 1361 and your Petitioners quote further from the Article by Professor Byse and Joseph V. Fiocca as follows at Pages 350 through 354 inclusive:

"Another potential pitfall for the litigant was opened by a recent case where it was intimated that a declaratory judgment would not be appropriate in a section 1361 action.<sup>152</sup> This is clearly incorrect. While it is true that the declaratory judgment statute<sup>153</sup> is not

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152 *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F.2d 364, 367 (10th Cir.), cert. denied, 385 U.S. 831 (1966).

153 Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1964).

of itself jurisdictional, <sup>154</sup> it authorizes relief in actions where the court has another basis of jurisdiction. <sup>155</sup> Since from the very beginning section 1361 was intended to be jurisdictional, it can provide the independent basis of jurisdiction necessary to sustain an action for a declaratory judgment. <sup>156</sup>

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- 154 Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).
- 155 Lee Wing Hong v. Dulles, 214 F.2d 753 (7th Cir. 1954); Brownell v. Ketcham Wire & Mfg. Co., 211 F.2d 121 (9th Cir. 1954). See also 3 W. Barron & A. Holtzoff, Federal Practice and Procedure § 1262 (C. Wright ed. 1958).
- 156 A close question might arise if, in an action where section 1361 were the sole basis of jurisdiction, the plaintiff sought declaratory relief as to a matter which would normally be a subject of negative rather than affirmative injunctive relief, such as a declaratory judgment against the enforcement of an impending regulatory order. It might be argued that such an action lacked the requisite jurisdictional base, since section 1361 was intended to enable the granting of equitable relief 'in the nature of mandamus.' The plaintiff, however, could reply by pointing out that section 1361 is designed so that one may compel an officer to 'do his duty,' that it is the duty of the officer not to perform an illegal act, and therefore, that section 1361 should be construed to apply to such a case. In the event this interpretation does not prevail, the action might nonetheless be salvaged if the court were willing to accept the APA as a jurisdictional grant.

Fortunately, some courts have given section 1361 a more hospitable construction. An outstanding example is *Ashe v. McNamara*.<sup>157</sup> Plaintiff Ashe was a steward third class in the Navy in 1945 at which time he and two co-defendants were tried by a general court-martial for assaulting another member of the Navy. The three defendants were represented by a single counsel. At the trial one of the defendants, Brown, who had informed counsel that he had attacked the victim, changed his story and testified that Ashe had struck the blows. Defense counsel immediately informed the court that this unexpected testimony placed him in the position of being unable to defend Brown and Ashe without attacking one or the other and he stated, 'I don't think I should continue to represent the two defendants.' The court, nevertheless, directed counsel to proceed on behalf of all the defendants, and all were convicted, sentenced to terms in prison, and given dishonorable discharges from the Navy.

Ashe was released from prison in 1948. In 1959 he petitioned the Board of Correction of Naval Records to change his discharge to an honorable one. The Board denied the petition, the Secretary of Navy approved the denial, and the United States Court of Military Appeals dismissed Ashe's petition for review. Ashe, a Massachusetts resident, instituted an action in the federal district court in Massachusetts pursuant to section 1361 against the Secretary of Defense to compel the Secretary to change the dishonorable character of the discharge.

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157 355 F.2d 277 (1st Cir.), rev'g 243 F. Supp. 243 (D. Mass. 1965).

The district court dismissed the action on the ground that article 76 of the Uniform Code of Military Justice <sup>158</sup> made Ashe's discharge 'final and conclusive' and not subject to collateral attack except possibly in a petition for habeas corpus or in an action for back pay. On appeal, the First Circuit reversed the lower court's judgment in a unanimous opinion written by Judge Hastie, sitting by designation. Judge Hastie found that it was impossible for the trial counsel to function effectively on behalf of both men. He concluded that Ashe's conviction 'was the product of court-martial procedure so fundamentally unfair' that Ashe would have been entitled to release from imprisonment in a habeas corpus proceeding. The question thus presented was whether, since Ashe no longer was imprisoned and therefore habeas corpus did not lie, another form of relief was available. The court's conclusion was that section 1361 provided an appropriate remedy.

Judge Hastie's opinion in Ashe v. McNamara is an admirable treatment of section 1361. Jurisdiction was based exclusively upon that section. <sup>159</sup> The

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<sup>158</sup> 10 U.S.C. § 876 (1964).

<sup>159</sup> Judge Hastie noted, 'At the outset, it merits mention that this action is brought under section 1361 of title 28, United States Code, part of a 1962 enactment which enlarged the jurisdiction of the district courts and liberalized venue.' 355 F.2d at 279.

lower court had denied relief. It would have been easy for the appellate court to have quoted from the report of the Senate Judiciary Committee that the statute gave the judiciary 'no control over the substance of the (administrative) decision,' <sup>160</sup> to have cited some of the older Supreme Court mandamus cases to the effect that 'where the duty . . . depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus,' <sup>161</sup> and to have affirmed the decision of the lower court. Fortunately, Judge Hastie did nothing of the kind. Instead, he examined the relevant statutes, studied the legislative materials which illumined their meaning, determined the scope of the power delegated to the administrative officials, and ordered relief for the plaintiff.

#### V. CONCLUSION

The Mandamus and Venue Act of 1962 has substantially achieved the objectives of its sponsors. First, citizens have been relieved of the expense and inconvenience caused by the requirement that certain nonstatutory judicial review actions be brought in Washington, D.C., for judicial review actions in local federal courts no

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<sup>160</sup> S. Rep. No. 1992, 87th Cong., 2d Sess. 4 (1962).

<sup>161</sup> Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 219 (1930).

longer need be dismissed because of the doctrine of indispensable parties or the lack of original mandamus jurisdiction in the federal district courts outside the District of Columbia. Second, the courts have not construed the legislation to authorize them to review governmental determinations that before 1962 would not have been reviewable by the federal courts in the District of Columbia. Thus, they have refused to review interlocutory administrative action and they have -- albeit at times with understandable reluctance---respected the bar to judicial review interposed by the Supreme Court's interpretation of the sovereign immunity doctrine. Third, the courts outside the District of Columbia in reviewing dismissals of government employees and other official acts under section 1361 have not --except possibly in a few sporadic cases --- applied a scope of review that is in any observable way significantly different from the scope of review applied by the federal courts in the District of Columbia. In sum, section 1361 appears to have been accepted by the federal judiciary --- as it was intended by its sponsors --- as a modest legislative reform limited to achieving decentralization of nonstatutory judicial review actions.

Despite contrary expressions in a few opinions, it does not appear that the clause inserted at the insistence of the Department of Justice, 'in the nature of mandamus,' has caused a revival or expansion of either the ministerial-discretionary distinction or the clear-duty-to-act rule. Although the likelihood of such a revival or expansion probably is not great, the

possibility should not be overlooked. A busy judge might be misled by a superficial reading of quotations from the Senate Judiciary Committee report <sup>162</sup> or from some of the older Supreme Court opinions in mandamus cases. <sup>163</sup> Plaintiff's counsel thus has a special responsibility both to invite the court's attention to the complete legislative history of section 1361 and to enlighten the court concerning the proper role

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- 162 The portions of the report most likely to mislead are the following:  
(The bill) grants jurisdiction to the district courts to issue orders compelling Government officials to perform their duties and to make decisions in matters involving the exercise of discretion, but not to direct or influence the exercise of the officer or agency in the making of the decision . . . . .

The Department of Justice in its report on the bill expressed concern that the bill might be interpreted to give the district courts jurisdiction to order a Government official to act in a manner contrary to his discretion. The committee, therefore, has adopted the amendment set forth to section I which specifies that the court can only compel the official or agency to act where there is a duty, which the committee construes as an obligation, to act or, where the official or agency has failed to make any decision in a matter involving the exercise of discretion, but only to order that a decision be made and with no control over the substance of the decision.

S. Rep. No. 1992, 87th Cong., 2d Sess. 2,4, (1962).

- 163 E.g., *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414 (1931); *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206 (1930).

of the judiciary in a 'nature-of-mandamus' case, which is, as has been stressed throughout this article, that the court should utilize all relevant legislative and other materials to determine the scope of the discretion of power delegated to the officer. Needless to say, counsel for the plaintiff, as well as counsel for the Government, should provide every possible assistance to the court in the latter's effort to ascertain the nature and extent of the defendant's authority."

I presume the Court will note the criticism of Byse and Fiocca of two of the leading cases cited against Mandamus herein by Dorita High Horse and the Secretary of the Interior in their Answer Briefs. In their footnote 152 supra, Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 is criticized by saying that the import of the decision is incorrect and in their footnote 161 supra, Wilbur v. United States, 281 U.S. 206 cited by the Secretary of the Interior as authority contra to Mandamus is criticized as authority which is now out of date according to the modern trend.

Your Petitioners believe that it was the opinion of the Trial Court based upon the past application of the Statute in question (25 U.S.C. 373) by the Department of the Interior and by their own interpretation of the way the Statute should be applied, the Secretary of the Interior had no option but to approve the Will of the Indian testator when the factum of the Will was satisfactory and there was no other cogent reason for disapproving the Will except the equity doctrine authority, which had never been used by the Secretary of the Interior prior to that time as his reason for the approval or disapproval of the Wills of Indian testators. Your Petitioners will make further statements hereinafter in their

Reply Brief in regard to the fact whether or not the Secretary of the Interior had used the equity theory in prior cases as a reason for approving or disapproving Wills of Indian testators.

REPLY OF PETITIONERS TO ARGUMENT OF THE SECRETARY OF THE INTERIOR THAT THE 1910 ACT PRECLUDES REVIEW OF THE SECRETARY OF THE INTERIOR'S REFUSAL TO APPROVE AN INDIANS WILL DISPOSING OF ALLOTTED LANDS.

Time for preparing this Reply Brief for the purpose of filing in the Court before oral argument is becoming limited. Your Petitioners are not going to make an attempt to answer every portion of the above argument by the Secretary of the Interior and your Petitioners have already answered the argument against Mandamus by the Secretary of the Interior.

Your Petitioners feel compelled to comment upon the statement of the Secretary of the Interior in his Answer Brief at Page 9. The Secretary in discussing Sections 1 and 2 of the Act of June 25, 1910, states that Sections 1 and 2 are parallel in many respects and the Secretary states that both sections empower the Secretary "in his discretion" to sell restricted lands, and both sections authorizes the Secretary to remove restrictions and issue patents to devisees and legatees, and the role of the Secretary under both sections is managerial and supervisory and requires the exercise of discretion. The Secretary continues that logic dictates that Congress intended for the Secretary to have the same authority with respect to approving Wills under Section 2 as he does with respect to determining heirs under Section 1 and the discretion of the Secretary to approve a Will should be no less than his discretion to determine heirs.

It is your Petitioners interpretation of the statement of the Secretary in his Brief that the determining of heirs of a deceased Indian dying intestate without a Will and owning an allotment is a discretionary function and in his discretion he can approve the heirs or not approve the heirs. Upon reading Section 1, the section states that the Secretary of the Interior "shall" ascertain the legal heirs of the decedent intestate Indian and his decision shall be final and conclusive. Section 1 of the 1910 Act proceeds with certain discretionary functions relative to the removal of restrictions and the issuance of patents if the Secretary shall find the Indian capable to have his property unrestricted, etc., but these discretionary decisions are not applicable when the Secretary of the Interior is making a determination of the legal heirs because he is directed and ordered by Congress to determine the heirs of an intestate Indian.

Consequently, it is the opinion of your Petitioners that the discretionary function of the Secretary of the Interior under Section 1 of the 1910 Act and Section 2 of the 1910 Act concerns the removal of restrictions from trust and restricted properties, etc., but the said discretionary functions of the Secretary of the Interior do not inure to the approval of the heirs of the decedent Indian under Section 1 and the approval of the Will of an Indian under Section 2 of the 1910 Act. The Secretary must approve the heirs of the decedent intestate Indian and your Petitioners believe it is also his duty and not a discretionary act to approve the Will of an Indian if the factum of the Will is proper and in accordance with the regulations issued by the Secretary of the Interior.

In the Answer Brief of the Secretary of the Interior, he stated that an absurd situation

could result if Sections 1 and 2 are not read together as illustrated by the case of Hayes v. Seaton, 270 F.2d 319 (C. A. D. C.). The Answer Brief of the Secretary continues as follows:

"In that case, the Secretary was called upon to decide whether a deceased Indian's son and legatee had survived his father (who left a will), the son (who died intestate) having disappeared one year before the father's death. The majority opinion characterized that decision as a determination of the son's legal heirs, under Section 1. Chief Justice Burger, then Circuit Judge, argued persuasively in his dissent that both Sections 1 and 2 were applicable to that determination. In line with the prior holdings of the District of Columbia Circuit referred to above, Judge Burger felt that Section 2 determinations were reviewable."

The Secretary then further proceeds to justify his view point that Sections 1 and 2 should be read together. Your Petitioners believe that a perusal of the dissenting Opinion of Chief Justice Burger in Hayes v. Seaton, Supra nullifies and overrules the argument of the Secretary of the Interior that Sections 1 and 2 should be read together. Your Petitioners believe that it is entirely possible that this Court may apply temporal depth and now rule that decisions under both Sections 1 and 2 are subject to Judicial review.

It has been the recent philosophy of this Court to allow an Indian as an individual, individually, to have his day in Court as exemplified by Poafpybitty v. Skelly Oil Co., 390 U.S. 365. This recent case, of course, held that an Indian as an individual could bring a suit against an Oil Company for improper venting

of gas from an oil and gas lease on trust Indian lands which lease had been issued and approved pursuant to United States Government Statutes and Regulations. It was the contention of the Oil Company approved by the Oklahoma Supreme Court that the action could only be maintained by the United States acting by and through the Secretary of the Interior and consequently, could not be maintained by the Indian as an individual.

REPLY OF PETITIONERS TO ARGUMENT OF THE SECRETARY OF THE INTERIOR IN HIS ANSWER BRIEF THAT THE REFUSAL OF THE SECRETARY TO APPROVE THE WILL IN THIS CASE COULD NOT BE REVERSED BECAUSE THE SECRETARY PROPERLY TOOK EQUITABLE CONSIDERATION INTO ACCOUNT IN REACHING HIS DECISION.

Your Petitioners do not and can not agree with this argument presented by the Secretary of the Interior including his quotation from Homovich which does not correctly state the criteria of the said decision and the converse of this argument was answered by Chief Justice Burger in his dissent in Hayes v. Seaton supra. The Secretary of the Interior proceeds with the argument that the Secretary has always considered equity factors when he makes his decisions relative to the approval or disapproval of Wills of Indian testators and he cites the case of Estate of Wook-Kah-Nah, 65 I.D. 436.

Your Petitioners again reiterate as they have in all of their Briefs from the inception of this case in the Trial Court that the Secretary of the Interior has never used the criteria that equity must be disbursed by the Indian testator and if equity was not disbursed by making his Will, then the Secretary could refuse to approve his Will, which was done in this case.

Legal counsel for your Petitioners was an employee of the Solicitor's Office for the Secretary of the Interior stationed at Anadarko,

Oklahoma, during the years relative to the probate of the last Will of Wook-Kah-Nah and as has been previously stated, Wook-Kah-Nah made a Will leaving extremely valuable oil runs to two of her heirs and she gave no lands on which oil wells were located to several other children, including two grandchildren. She was also an illiterate woman who could not read or write, but nevertheless, the Secretary of the Interior on appeal when approving the decision of the Examiner of Inheritance who had approved her Will, made the following statement:

"It is apparent from the record that the testatrix, Wook-Kah-Nah, knew each of her children and was aware of each one's financial status; she knew in a general way all of her properties and which were of greater value; she knew that she was receiving large royalty payments from the oil produced from her own allotment and she had a definite plan for the distribution of her estate in a manner which she believed would best meet the needs of her children and satisfy her own desires. It is evident that the testatrix demonstrated a sufficient capacity to satisfy the requirements for the validity of her will made of February 20, 1954." (Emphasis added.)

We thus see that the Secretary of the Interior on Appeal did not take equity into consideration when approving the Will of Wook-Kah-Nah.

Without being burdensome to the Court, we would again suggest that the Memorandum for the Assistant Secretary dated May 10, 1941, which has been heretofore quoted from in the Briefs of your Petitioners further nullifies the argument of the Secretary of the Interior that equitable principals have been used in the past in approving or disapproving the Wills of Indian testators and we believe this Court will so find.

CONCLUSION

For the foregoing reasons in this Brief and in the original Brief, your Petitioners pray that this Court order the Estate of George Chahsenah distributed pursuant to the terms of his last Will and Testament dated March 14, 1963.

Respectfully submitted,

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January, 1970

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 300.—OCTOBER TERM, 1969

Julia Tooahnippah (Goombi)  
et al., Petitioners,

v.

Walter J. Hickel, Secretary of  
the Interior, et al.

On Writ of Certiorari to  
the United States Court  
of Appeals for the  
Tenth Circuit.

[April 27, 1970]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ to review the action of the Court of Appeals holding that the decision of the Regional Solicitor, acting for the Secretary of the Interior, disapproving the will of a Comanche Indian constitutes final and unreviewable agency action. We conclude that such decision is subject to judicial review.<sup>1</sup>

George Chahsenah, a Comanche Indian, died on October 11, 1963, unmarried and without a surviving father, mother, brother, or sister. His estate consisted of interests in three Comanche allotments situated in Oklahoma under the jurisdiction of the Bureau of Indian Affairs, Department of the Interior.<sup>2</sup> Shortly after

<sup>1</sup> The Court of Appeals decision, which held that the United States District Court for the Western District of Oklahoma had erred in reviewing the Regional Solicitor's action, is reported as *High Horse v. Tate*, 407 F. 2d 394.

<sup>2</sup> The General Allotment Act of February 8, 1887, 24 Stat. 388, as amended by Act of February 28, 1891, 26 Stat. 794, as amended by Act of June 25, 1910, 36 Stat. 855, 25 U. S. C. § 331 *et seq.*, provides, *inter alia*, for the allotment to individual Indians of parcels of land. The title to these lands is held by the United States in

Chahsenah's death, the value of those interests was fixed at \$34,867. On March 14, 1963, Chahsenah had made a will devising and bequeathing his estate to a niece, Viola Atewoofatakewa Tate, and her three children, petitioners herein. Chahsenah had resided with this niece a considerable portion of the later years of his life. His will made no mention of a surviving daughter, but stated that he was leaving nothing to his "heirs at law . . . for the reason that they have shown no interest in me."

The beneficiaries under the will sought to have it approved by the Secretary of the Interior, as required by 25 U. S. C. § 373.<sup>3</sup> A hearing was had before an Examiner of Inheritance, Office of the Solicitor, Department of the Interior. Dorita High Horse, claiming as sole surviving issue, and certain nieces and nephews of the testator contended that the will was not entitled to departmental approval, arguing that due to the effects

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trust for the allottee, or his heirs, during the trust period, or any extension thereof. Chahsenah had inherited the interests he held at his death.

<sup>3</sup> Section 2 of the Act of June 25, 1910, 36 Stat. 856, as amended by Act of February 14, 1913, 37 Stat. 678, 25 U. S. C. § 373, provides in pertinent part:

"Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator . . . . *Provided also,* That this section and section 372 of this title shall not apply to the Five Civilized Tribes or the Osage Indians."

of chronic alcoholism, cirrhosis of the liver, and diabetes, George Chahsenah was incompetent to make a will. Pursuant to the provisions of § 5 of the Act of February 28, 1891, 26 Stat. 795, 25 U. S. C. § 371, if Chahsenah had died intestate his putative daughter, Dorita High Horse, would have been an heir at law, regardless of whether or not her parents were married.

The Examiner found that the will of March 14, 1963, drawn on a form printed by the Department of the Interior for that purpose, was Chahsenah's last will and testament and that it had been prepared by an attorney employed by the Department of the Interior who advised the testator concerning the will. He also found that at the time the will was made the attorney and the witnesses executed an affidavit attesting that the will was properly made and executed, and that the decedent was of sound and disposing mind and memory and not acting under undue influence, fraud, duress, or coercion at the time of its execution. The Examiner found that Dorita High Horse was George Chahsenah's illegitimate daughter and his sole heir at law. He concluded, however, that the evidence presented by the contestants was not sufficient to outweigh the presumption of correctness attaching to a properly executed will, in addition to which were the unimpeached statements of the draftsman and witnesses that Chahsenah possessed testamentary capacity. The Examiner concluded that the testator's failure to provide for Dorita High Horse was not unnatural since there was no evidence of any close relationship between the two during any part of their lives. The will was approved and distribution in accordance with its provisions was ordered.

A petition for rehearing, contending that the evidence did not support the Examiner's conclusion regarding the decedent's competency, was denied. An appeal was taken to the Regional Solicitor, Department of the In-

terior, an officer having authority to make a final decision in the matter on behalf of the Secretary. He concluded that although the evidence supported the Examiner's finding that decedent's will met the technical requirements for a valid testamentary instrument, 25 U. S. C. § 373 vested in the Secretary broad authority to approve or disapprove the will. In exercising that discretion, the Regional Solicitor viewed his authority as requiring him to examine all the circumstances to determine whether "approval will most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law." Under this standard he concluded that the decedent, an unemployed person addicted to alcohol<sup>4</sup> and living on the income he received from his inherited land allotments, had not fulfilled his obligations to his illegitimate daughter and had ceased cohabiting with her mother shortly before Dorita's birth, thus failing to provide her with a "normal home life during her childhood." The Regional Solicitor concluded that although the daughter was a married adult and could not legally claim support monies from her father or his estate, "it is inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare . . . ." Accordingly, he found that under the circumstances the Examiner's approval of the will was not a reasonable exercise of the discretionary responsibility vested in the Secretary. He thereupon set aside the Examiner's action, disapproved the will,<sup>5</sup> and ordered

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<sup>4</sup> Reference to Chahsenah's supposed alcohol addiction carries an intimation that the Regional Solicitor saw some want of testamentary capacity, a notion contrary to his approval of the Examiner's finding of testamentary capacity and absence of undue influence.

<sup>5</sup> The Regional Solicitor gratuitously volunteered that if any of the five previous wills made by the testator between 1956 and 1963 were presented he would disapprove them because they made no provision for Dorita High Horse. The record discloses no inquiry

the entire estate distributed by intestate succession to Dorita High Horse as sole heir at law.

The beneficiaries under the will brought an action against the Secretary of the Interior in the United States District Court for the Western District of Oklahoma contending that the action of the Regional Solicitor was arbitrary, capricious, and an abuse of discretion, and that it exceeded the authority conferred upon the Secretary by 25 U. S. C. § 373. The plaintiffs sought to have the District Court review the Regional Solicitor's action in accord with the standards of the Administrative Procedure Act, 5 U. S. C. §§ 701-706 (1964 ed., Supp. IV), arguing that the District Court had jurisdiction over the matter by virtue of either that Act<sup>6</sup> or 28 U. S. C. § 1361.<sup>7</sup> Dorita High Horse was allowed to intervene as a party defendant. Both the Secretary and Dorita High Horse moved for summary judgment, contending that the action of the Regional Solicitor was within the authority conferred upon the Secretary, and, as such, is made final and unreviewable by 25 U. S. C. § 373. They also contended that the Regional Solicitor's decision was in accordance with the evidence, was not arbitrary or capricious, and did not involve an abuse of discretion. Although the Secretary conceded that the

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by him into the circumstances of the execution of those wills, the testator's state of health at the time of their execution or his reasons for omitting provision for Dorita High Horse.

<sup>6</sup> The plaintiffs supporting the will appear to have relied upon 5 U. S. C. § 702 (1964 ed., Supp. IV), which provides:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

<sup>7</sup> 28 U. S. C. § 1361 provides:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

District Court had jurisdiction to review the action of the Regional Solicitor, Dorita High Horse contended that neither the Administrative Procedure Act nor 28 U. S. C. § 1361 allowed judicial review.

The District Court held that while there was some question as to whether jurisdiction existed under the Administrative Procedure Act, 28 U. S. C. § 1361 did provide a basis for jurisdiction, "in order to effectuate the purposes of the Administrative Procedure Act by providing the review function which the act contemplates."<sup>8</sup> 277 F. Supp. 464, 465 n. 1. The court then reasoned that, unlike § 1 of the Act of June 25, 1910, 36 Stat. 855, 25 U. S. C. § 372,<sup>9</sup> § 2, 36 Stat. 856, as amended by the Act of February 14, 1913, 37 Stat. 678, 25 U. S. C. § 373, contains no language conferring unreviewable finality upon a decision of the Secretary approving or disapproving an Indian's will. The District Judge concluded that the Administrative Procedure Act, 5 U. S. C. § 701 (1964 ed., Supp. IV), does not preclude judicial review of the Regional Solicitor's action. On the merits he held that Congress had conferred upon adult Indians

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<sup>8</sup> We express no opinion as to the correctness of this determination. The complaint alleged that the amount in dispute was in excess of \$10,000, exclusive of interest and costs, and that the dispute arose under the laws of the United States. Independent of the District Court's ruling, it had jurisdiction over the complaint under 28 U. S. C. § 1331. Cf. *Machinists v. Central Airlines*, 372 U. S. 682, 685 n. 2 (1963); *AFL v. Watson*, 327 U. S. 582, 589-591 (1946).

<sup>9</sup> That section provides in pertinent part:

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. . . ." (Emphasis added.)

the right to make a will, limited only by the requirement that it be approved by the Secretary.

The District Court held that the review powers of the Secretary are not so broad as to defeat a plainly expressed and rationally based distribution by one who possessed testamentary capacity. The court concluded that the Regional Solicitor incorrectly viewed the Secretary's powers as authorizing disapproval of any will thought unwise or inequitable, and stated "Congress has conferred the right to make a will upon the Indian and not upon the Secretary. The Secretary can no more use his approval powers to substitute his will for that of the Indian than he can dictate its terms." 277 F. Supp., at 468. The case was remanded to the Secretary with directions to approve the will and distribute the estate in accordance with its provisions.

On appeal the Court of Appeals for the Tenth Circuit reversed the District Court, holding that the Secretary's action under 25 U. S. C. § 373 was unreviewable.<sup>10</sup>

Two basic questions are presented here: First, whether the Secretary's action is subject to judicial review; and second, if judicial review is available, whether on this record the Secretary's decision on the validity of the will was within the scope of authority vested in him under 25 U. S. C. § 373.

## I

The Administrative Procedure Act contemplates judicial review of agency action "except to the extent that— (1) statutes preclude judicial review; or (2) agency ac-

<sup>10</sup> There is a conflict in the circuits on this point. Compare *Hayes v. Seaton*, 106 U. S. App. D. C. 126, 128, 270 F. 2d 319, 321 (1959); *Homovich v. Chapman*, 89 U. S. App. D. C. 150, 153, 191 F. 2d 761, 764 (1951), with *Heffelman v. Udall*, 378 F. 2d 109 (C. A. 10th Cir.), cert. denied, 389 U. S. 926 (1967); *Attocknie v. Udall*, 390 F. 2d 636 (C. A. 10th Cir.), cert. denied, 393 U. S. 833 (1968).

tion is committed to agency discretion by law. . . ." 5 U. S. C. § 701 (1964 ed., Supp. IV). Earlier in this Term in *City of Chicago v. United States*, 396 U. S. 162, 164 (1969), relying on *Abbott Laboratories v. Gardner*, 387 U. S. 136, 140 (1967), we noted that "we start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose."<sup>11</sup> Section 2 of the Act of 1910 contains no language displaying a congressional intention to make unreviewable the Secretary's approval or disapproval of an Indian's will.

The respondents argue that we should follow the course taken by the Court of Appeals, reading into § 2 the language of the first section of the 1910 Act, which declares that the Secretary's decisions ascertaining the legal heirs of deceased Indians are "final and conclusive." Cf. *First Moon v. White Tail*, 270 U. S. 243, 244 (1926). The respondents contend that §§ 1 and 2 of the 1910 Act must be read *in pari materia* because both deal with the Secretary's power over the devolution of lands held in trust by the United States and both vest in the Secretary broad managerial and supervisory power over allotted lands.

We find this unpersuasive. First, while § 1 of the 1910 Act applies only to Indians possessed of allotments, § 2, as amended in 1913, also applies to all Indians having individual Indian monies or other properties held in trust by the United States. Thus, the coverage of these sections is not identical. Second, the 1910 Act is composed of some 33 sections, virtually all of which deal with the Secretary's managerial and supervisory powers over Indian lands. Many of these provisions vest in the

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<sup>11</sup> See also *Association of Data Processing Service Organizations v. Camp*, 397 U. S. 150 (1970); *Barlow v. Collins*, 397 U. S. 159 (1970).

Secretary discretionary authority. For example, § 3 of the Act permits transfers of beneficial ownership of allotments by providing that allottees can relinquish allotments to their unallotted children if the Secretary "in his discretion" approves. 25 U. S. C. § 408. Yet neither this section nor any of the others in the enactment contains language cloaking the Secretary's actions with immunity from judicial review. If the respondents' position were accepted and we implied the finality language of § 1 into § 2, it would be difficult to justify on a reading of the statute a later refusal to extend the "final and conclusive" clause to other sections, such as § 3. Congress quite plainly stated that the Secretary's action under § 1 was not to be subject to judicial scrutiny. Similar language in § 2 would have made clear that Congress desired to work a like result under that section. Cf. *City of Chicago v. United States*, *supra*.

## II

The Regional Solicitor accepted the findings and conclusions of the Examiner of Inheritance that the testator had testamentary capacity when he executed the instrument, that he was not unduly influenced in its execution, and that it was executed in compliance with the prescribed formalities. This removes from the case before us all questions except the scope of the Secretary's power to grant or withhold approval of the instrument under 25 U. S. C. § 373.

The Regional Solicitor's view of the scope of the Secretary's power is reflected in his statement:

"When a purported will is submitted for approval and it has been determined that it meets the technical requirements for a valid will, further consideration must be given before approving or disapproving it to determine whether approval will most nearly achieve *just and equitable treatment of the bene-*

*ficiaries thereunder and the decedent's heirs-at-law."*  
App. 84-85. (Emphasis added.)

The basis of the Regional Solicitor's action emerges most clearly from his reliance on the legal relationship of the testator to his daughter and his failure to support her. From this he concluded that failure to provide for the daughter in the will did not meet the just and equitable "standard" that he considered the Secretary was authorized to apply in passing on an Indian will. The Regional Solicitor related the failure to support the daughter in her childhood to the absence of provision for her in the will and declared that the decedent "had an obligation to his daughter which was not discharged either during his lifetime or under the terms of his purported will. *For this reason* it is inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare . . . ." (Emphasis added.) While thus stressing the natural ties with Dorita High Horse, the Regional Solicitor neither challenged nor gave weight to the predicate of the Examiner's determination which was that the decedent had a close and sustained familial relationship with his niece and had resided in her home, while, in contrast, he had virtually no contact with his natural daughter.

To sustain the administrative action performed on behalf of the Secretary would, on this record, be tantamount to holding that a public officer can substitute his preference for that of an Indian testator. We need not here undertake to spell out the scope of the Secretary's power, but we cannot assume that Congress, in giving testamentary power to Indians respecting their allotted property with the one hand, was taking that power away with the other by vesting in the Secretary

the same degree of authority to disapprove such a disposition.<sup>12</sup>

In reaching our conclusions it is not necessary to accept the contention of the petitioners that the Secretary's authority is narrowly limited to passing on the formal sufficiency of a document claimed to be a will. The power to make testamentary dispositions arises by statute; here we deal with a special kind of property right under allotments from the Government. The right is not absolute; the allottee is the beneficial owner while the Government is trustee. 25 U. S. C. § 348. The Indian's right to make *inter vivos* dispositions is limited and requires approval of the Secretary. The legislative history reflects the concern of the Government to protect Indians from improvident acts or exploitation by others, and comprehensive regulations govern the process of such *inter vivos* dispositions. No comparable regulations govern the right to make testamentary dispositions, and from this one might argue that the power of an Indian relating to testamentary disposition of allotted property is uninhibited. The legislative history on this score is perhaps no more or less reliable an indicator of what Congress intended than is usual when the scope of administrative discretion is in question.

Whatever may be the scope of the Secretary's power to grant or withhold approval of a will under 25 U. S. C.

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<sup>12</sup> This is borne out by the Secretary's interpretation of § 373 in an arguably "improvident" testamentary disposition. As to a will naming a Caucasian as a beneficiary, a Memorandum, dated May 10, 1941, from the Solicitor's Office to the Assistant Secretary of the Interior, stated, *inter alia*,

"Whatever discretion the Secretary may have in the matter of approving or disapproving the will, it is clear that this discretion should not be exercised to the extent of substituting his will for that of the testator. . . ."

§ 373, we perceive nothing in the statute or its history or purpose that vests in a governmental official the power to revoke or rewrite a will that reflects a rational testamentary scheme with a provision for a relative who befriended the testator and omission of one who did not, simply because of a subjective feeling that the disposition of the estate was not "just and equitable." The Regional Solicitor's action was based on nothing more that we can discern than his concept of equity and in our view this was not the kind or degree of discretion Congress vested in him. Cf. *Attocknie v. Udall*, 261 F. Supp. 876 (D. C. W. D. Okla. 1966), reversed on other grounds, 390 F. 2d 636 (C. A. 10th Cir.), cert. denied, 393 U. S. 833 (1968).

The Secretary's task is not always an easy one and perhaps is rendered more difficult by the absence of regulations giving guidelines. It is not difficult to conceive of dispositions so lacking in rational basis that the Secretary's approval could reasonably be withheld under § 373 even though the same scheme of disposition by a non-Indian of unrestricted property might pass muster in a conventional probate proceeding; on this record, however, we see no basis for the decision of the Regional Solicitor and must hold it arbitrary and capricious. There being no suggestion that the record need or could be supplemented by added factual material, the case is remanded to the Court of Appeals with directions to reinstate the judgment of the District Court.

*Reversed and remanded.*

MR. JUSTICE BLACK, for the reasons set forth by the Court of Appeals in this case, 407 F. 2d 394, and in *Heffelman v. Udall*, 378 F. 2d 109 (C. A. 10th Cir. 1967), would affirm the judgment below.

# SUPREME COURT OF THE UNITED STATES

No. 300.—OCTOBER TERM, 1969

Julia Tooahnippah (Goombi)  
et al., Petitioners,

v.

Walter J. Hickel, Secretary of  
the Interior, et al.

On Writ of Certiorari to  
the United States Court  
of Appeals for the  
Tenth Circuit.

[April 27, 1970]

MR. JUSTICE HARLAN, concurring.

The Court's opinion has two aspects: *First*, that the Secretary of Interior's approval or disapproval of a will disposing of restricted Indian property is subject to judicial review in a federal court. *Second*, that the Secretary's action disapproving the decedent's will in the circumstances of this case was not a valid exercise of the authority vested in him by the first proviso of 25 U. S. C. § 373.<sup>1</sup> I join the Court's opinion in both respects; but I deem it appropriate to amplify the reasons given by the Court for its second conclusion.

From the facts stated in the Court's opinion, I think the issue presented by the merits of this case can fairly be characterized as follows: When there is no evidence of fraud, duress or undue influence, when the decedent is of sound and disposing mind, when there is a rational basis for the decedent's disposition, and when the will meets all the technical requirements of the Secretary's regulations, does the proviso of 25 U. S. C. § 373 authorize the Secretary of the Interior or his delegate to withhold approval of an Indian will simply because he concludes, in the

<sup>1</sup> The text of 25 U. S. C. § 373 is quoted in relevant part in n. 3, *ante*, of the Court's opinion.

absence of any standards of general applicability, that the distribution pursuant to the will does not "most nearly achieve just and equitable treatment of the beneficiaries and the decedent's heirs-at-law"?

As the Court's opinion suggests, the petitioners would have us decide this issue by holding that the Secretary can do no more under § 373 than see to it that the various technical requirements of a valid testamentary instrument have been met. Nothing in the language of the statute would prevent such a construction, and as a way of preventing any possibility of arbitrary bureaucratic action to be undertaken in the name of paternalism there is much to commend it. I think the petitioner's claim must be rejected, however, because both the statutory network relating to the restrictions on allotted lands (of which § 373 is only a part) and the legislative history of § 373 itself, suggest the Secretary's role was not to be that limited. Nevertheless, like the Court, I conclude that the Secretary is not empowered to disapprove a will simply on the basis of an *ad hoc* determination that it is unfair. In reaching this conclusion, although the Court's reasoning and my own are parallel in significant respects, I think it helpful for purposes of analysis to elaborate in somewhat greater detail than the Court finds necessary the background of the allotment system, the legislative history of § 373, and the administrative practice of the Department of the Interior in administering Indian wills.

Section 373 relates to the testamentary disposition of what is known as restricted Indian property. This property consists primarily of beneficial interests in land allotments held in trust by the Government for individual Indians. Under the allotment system established by the Dawes Act in 1887, 24 Stat. 388, an eligible Indian was given a property interest in a specific tract of land. Although the allottee was ordinarily given possessory rights

to the land, his interest was not a fee simple. Instead, the land is held in trust by the United States for the benefit of the particular Indian, 25 U. S. C. § 348. See 25 U. S. C. § 331-358.

As long as the legal title to the land is held in trust, there are drastic restrictions on the alienability of these allotment interests.<sup>2</sup> In fact, 25 U. S. C. § 348 broadly states that any "conveyance" of an allotment held in trust, or any "contract" affecting that land, "shall be absolutely null and void." Moreover, it is a crime for "any person to induce any Indian to execute any contract, deed or mortgage . . . purporting to convey any land . . . held by the United States in trust for such Indian," 25 U. S. C. § 202. Under an elaborate regulatory scheme, it is only by securing the prior approval of the Secretary of the Interior that someone like George Chahsenah, the decedent here, could sell, mortgage, or give away his restricted allotments.<sup>3</sup> These substantial restrictions on the free alienability of allotted lands suggest that, in making the Secretary's approval a condition for the validity of a will disposing of these lands, Congress did not mean to foreclose the possibility that the Secretary might do more than simply see that the will had the requisite number of witnesses, and that the testator had the capacity to make a will.

What little legislative history there is for § 373—and there is very little—also suggests that the Secretary

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<sup>2</sup> At the end of the trust period—not yet expired because the initial 25-year period has been extended—the allottee was to receive a fee simple interest in the land. See 25 U. S. C. § 391. Before the termination of the trust period, the Secretary is now authorized, for a particular Indian, to remove the restrictions on alienation, see 25 U. S. C. § 372; 25 CFR § 121.49.

<sup>3</sup> See 25 CFR §§ 121.9-121.20, 121.61, 121.18 (b), promulgated under the authority of 25 U. S. C. § 379. There are also restrictions on the allottee's ability to lease the land, see 25 U. S. C. §§ 393, 403, 415 (a); 25 CFR subchs. P and Q.

was given broader powers than a state probate judge. Section 373 has its origins in a 1910 "omnibus" Indian bill, 36 Stat. 855-863. This bill was a potpourri of provisions, for the most part unrelated to the devolution of allotted lands. However, § 2 of the bill, 36 Stat. 856, gave to the Indian, for the first time, the power to dispose of his restricted allotments by will,<sup>4</sup> rather than simply have the allotments descend to his heirs by the operation of law.<sup>5</sup> The origins of § 2 are rather obscure, and only the House Committee Report on the omnibus bill even refers to § 2 and then only in descriptive terms.<sup>6</sup>

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<sup>4</sup> Section 2, 37 Stat. 678 provided:

"That any Indian of the age of twenty-one years, or over, to whom an allotment of land has been or may hereafter be made, shall have the right, prior to the expiration of the trust period, and before the issue of a fee simple patent, to dispose of such allotment by will, in accordance with rules and regulations to be prescribed by the Secretary of Interior: *Provided, however*, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Commissioner of Indian Affairs, and the Secretary of Interior:

"*Provided further*, that section one and two of this Act shall not apply to the State of Oklahoma." Section 2 was amended to its present form (25 U. S. C. § 373) by 37 Stat. 678 (1913).

<sup>5</sup> See 25 U. S. C. § 348.

<sup>6</sup> See H. R. Rep. No. 1135, 61st Cong., 2d Sess., at 2 (April 26, 1910); S. Rep. No. 868, 61st Cong., 2d Sess. (June 17, 1910); H. R. Rep. No. 1727, 61st Cong., 2d Sess. (June 23, 1910) (Conference Report).

The original bill, as introduced in the House by Congressman Burke and referred to the Indian Affairs Committee, contained no provision empowering Indians to make wills. See H. R. 12439, 61st Cong., 2d Sess. (introduced Dec. 6, 1909). The bill reported out of committee had such a provision, however, H. R. 24992. The House Committee Report suggested that the changes and additions to H. R. 12439 found in H. R. 24992 were made in response to recommendations made by the Secretary of the Interior in a letter of April 13, 1910. See H. R. Rep. No. 1135, *supra*, at 1. However, examination of the letter referred to in the House Committee Report, together with the revisions suggested therein, reveals neither

Even though the Committee Reports provide no indication of the Secretary's powers under the proviso of § 373, there was one exchange on the floor of the House in which Congressman Burke, the sponsor of the omnibus bill, does strongly suggest that he at least envisioned the role of the Secretary under § 373 to extend beyond simply seeing that the will met all the formal requirements of a valid testamentary instrument. This exchange between Congressman Burke and Congressman Cox of Indiana went as follows:

"Mr. COX of Indiana. Mr. Chairman, what is the gentleman's opinion as to whether or not the proviso contained in section 2 [now 25 U. S. C. § 373] does not place the complete power of the will in the hands of the Commissioner of Indian Affairs:

"Mr. BURKE of South Dakota. The Commissioner of Indian Affairs and the Secretary of the Interior, of course, would not favor the provision permitting Indians to make wills unless the making of them were subject to the approval of the department.

"Mr. COX of Indiana. Under the proviso as it now exists in section 2, does it not place complete power in the hands of the Secretary of the Interior and the Commissioner of Indian Affairs over the will of an Indian with absolute power to revoke the Indian's will?

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a reference to nor espousal of the idea that Indians be given testamentary capacity over restricted lands. See Letter of April 13, 1910, from Secretary of the Interior Richard A. Ballinger to Hon. Charles H. Burke with new draft of H. R. 12439.

The bill (H. R. 24992) was passed by the House as reported out of the Committee. The Senate amended the bill, deleting § 2 along with most of the remainder of the original House version. See S. Rep. No. 868, *supra*. However the Conference readopted for the most part all of the original House version, see H. R. Rep. No. 1727, *supra*, and § 2 was enacted into law in the identical form as originally passed by the House.

"Mr. BURKE of South Dakota. I think so.

"Mr. COX of Indiana. Then after all it simply imposes the entire power of making the will in the hands of the Commissioner of Indian Affairs.

"Mr. BURKE of South Dakota. I will say the purpose was this: It frequently happened—and I will speak of that in connection with sections 3 and 4 at the same time—it frequently happened an Indian has three or four children. He was allotted land at the time he had only two children, and the father and the mother have allotments and the two children who were living at the time allotments were made have allotments, but the other children have no land at all.

"Now, the Indian is just as human as a white man, and it frequently happens that he desires to have permission to give his allotment to the children who have no land, and in a case of that kind undoubtedly the Interior Department would O. K. it, whereas if it was a will giving his estate to some person who ought not to have it, then they would disapprove it.

"Mr. COX of Indiana. I suppose the purpose of this proviso is an equitable purpose, reserving in the Department of the Interior the power to compel the Indian to make a proper will——

"Mr. BURKE of South Dakota. Not compel him at all.

"Mr. COX of Indiana. Or else revoke the will if he did not make a proper will.

"Mr. BURKE of South Dakota. If the Indian makes a will, and it is not satisfactory to the commissioner and the Secretary, and I put both in to safeguard it, it will be disapproved of, and of course will be of no effect." 45 Cong. Rec. 5812.

It is primarily on the basis of the colloquy on the floor that the United States argues that we should uphold the Secretary's action in this case. According to the Government, this exchange shows that the Secretary was empowered to take "equitable considerations" into account in approving or disapproving a will. However, to affirm the administrative action in this instance, it would be necessary to hold that an otherwise valid will reflecting a rational testamentary disposition of the decedent's property can be disapproved simply because a government official decides that had he been the testator he would have written a different, and to his way of thinking, a "fairer" will.

Without attempting to define with precision the outer limits of the Secretary's authority under the proviso of § 373, I think it clear that it cannot be construed this broadly. First, it must be remembered that the primary purpose of § 373 is to give to the testator, not to the Secretary, the power to dispose of restricted property by a will. In according to the Indian testamentary capacity over restricted property Congress could have only intended to have given him the power to dispose of restricted property according to personal preference rather than the predetermined dictates of intestate succession. Such is the essence of the power to make a will. The notion that the Secretary can disapprove a will on the basis of a subjective appraisal—governed by no standards of general applicability<sup>7</sup>—that the disposition is unfair to a person who would otherwise inherit as a legal heir simply cuts too deeply into the primary objective of the statutory grant.

This conclusion that there must be limits to the Secretary's power under the proviso of § 373 if the primary purpose of the statute is to be accomplished, finds ex-

<sup>7</sup> See n. 10, *infra*.

plicit support in the Department of the Interior's own earlier construction of § 373. In response to a letter suggesting that the Secretary disapprove a will that both disinherited certain legal heirs and left part of the estate to a white person not related to the Indian decedent, the Office of the Solicitor stated in a written memorandum, after quoting the statute:

"The right to make a will is thus conferred on the Indian not on the Secretary. Whatever discretion the Secretary may have in the matter of approving or disapproving the will, it is clear that this discretion should not be exercised to the extent of substituting his will for that of the testator. Such clearly would be the effect of disapproval in the present case. The naming of a non-Indian as one of the beneficiaries is not a valid objection to approval of the will in the absence of fraud or other imposition, which is clearly not present."<sup>8</sup>

This statement reflects what appears to have been the consistent practice of the Secretary from 1910 up to the time of the administrative action taken in this case. For, apart from the case now before us, no other instance has been called to our attention in which an Indian's will was disapproved under circumstances requiring the broad discretionary authority claimed here.<sup>9</sup>

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<sup>8</sup> Memo. Sol. I. D. May 10, 1941.

<sup>9</sup> At oral argument, the government attorney was asked whether there were any other instances where the Secretary had disapproved a will in circumstances such as those here. He replied, "No, I have only been able to find cases in which the wills have been approved, though it is clear that equitable considerations were taken into account." Transcript of Oral Argument, at 30. The opinion of the Regional Solicitor in the present case cites three unreported decisions to support his broad claim of the right to determine

In summary, I think the statutory framework and legislative history of § 373 do indicate that the Secretary of Interior is not foreclosed from going beyond the technical requirements in deciding whether to approve a will. A will that disinherits the natural object of the testator's bounty should be scrutinized closely. If such a will was the result of overreaching by a beneficiary, or fraud; if the will is inconsistent with the decedent's existing legal obligation of support, or in some other way clearly offends a similar public policy; or if the disinheritance can be fairly said to be the product of inadvertence—as might be the case if the testator married or became a parent after the will was executed—the Secretary might properly disapprove it. However, I do not think the Secretary can withhold approval

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whether the "will most nearly achieve[s] just and equitable treatment." Although there is language in these opinions claiming for the Secretary "discretionary" authority to disapprove wills, all three involved wills that disinherited minor children for whom the decedent had an obligation of support at the time of his death. Moreover, in two of the three cases the disinherited child was born after the execution of the will, thus creating the possibility that the disinheritance was inadvertent. See *Estate of Oliver Maynahonah*, IA-T-1 (June 30, 1966); *Estate of Kosope (Richard) Maynahonah*, IA-141 (Oct. 28, 1954); *Estate of Frank (Oren F.) Simpkins* (will disapproved Dec. 1, 1943). In this case, on the other hand, the decedent's daughter was an adult, who was married, and who was completely estranged from her father both when his will was executed and at the time of his death. On the facts shown here there is no basis for concluding that the decedent's will reflects an uninformed or irrational disposition, or one which is contrary to public policy. Any notion that the Secretary has a regular policy of disapproving wills which disinherit illegitimate offspring is belied by *Attocknie v. Udall*, 261 F. Supp. 876 (W. D. Okla. 1966), where the Secretary approved a will that disinherited a son born out of wedlock.

simply because he concludes it was unfair of the testator to disinherit a legal heir in circumstances where as here there is a perfectly understandable and rational basis for the testator's decision.<sup>10</sup>

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<sup>10</sup> I do not mean to suggest that the Secretary might not promulgate a regulation that, like certain state statutes, provides that a testator cannot completely disinherit any of his offspring. A general standard like this would, of course, eliminate the dangers inherent in ad hoc determinations of whether the will is in some vague sense fair to an heir.